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In the

Supreme Court of the United States

OCTOBER TERM, 1932

No. 1

The Port Rate-Relation Case

THE TEXAS AND PACIFIC RAILWAY COMPANY et al.,

Appellants,

versus

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION et al.,

Appellees.

BRIEF ON REARGUMENT FOR THE TEXAS AND PACIFIC RAILWAY COMPANY, LOUISIANA & ARKANSAS RAILWAY COMPANY AND LOUISIANA, ARKANSAS & TEXAS RAILWAY COMPANY, APPELLANTS.

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September 16, 1932.

Warlick Law Printing Co.—Dallas

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Statement

By its order herein of May 31, 1932, the Court restored the case to the docket for reargument upon all questions involved and invited attention to the question whether the respective relations of the Louisiana ports

and the Texas ports to the export, import, and coastwise traffic affected, and to the rates condemned, by the orders in controversy, are such that the Louisiana ports may be regarded as localities unduly or unreasonably preferred by such rates within the sense and meaning of sections 3(1) and 15(1) of the Interstate Commerce Act, and that the Texas ports may be regarded as localities unduly prejudiced by such rates within the sense and meaning of the same sections. This brief will therefore treat of all questions at issue; but inasmuch as the contentions of these appellants have been set forth at length and in detail in their original briefs filed at the 1931 term, such contentions will in the main only be summarized herein. The particular question to which attention was invited by the Court will be discussed in greater detail, as will be certain additional considerations not heretofore fully developed. Certain formal matters will also be restated for convenience.

1. The decision of the lower court herein is reported at 42 Fed. (2d) 281, and the opinions, majority and dissenting, with the final decree of dismissal, appear in the printed record at pages 3571-83. The opinions of the Interstate Commerce Commission on which the orders in controversy were based are reported under the title of *Galveston Commercial Association* v. *Galveston, Harrisburg & San Antonio Railway Company*, 100 I. C. C. 110 (R. 3346-66), 128 I. C. C. 349 (R. 3367-3436) and 160

I. C. C. 345 (R. 3437-59). In the last of these opinions the Commission also decided its cause No. 20685, *Cooper Grocery Company* v. *Angelina & Neches River Railway Company*, the order in which is likewise under review herein. The orders in controversy appear of record as follows: in the *Galveston Commercial Association case*, No. 12798, R. 70-5, 76-84 and 87-92; in No. 20685, R. 93-4. These will hereafter be referred to as the 1925, 1927 and 1929 reports and/or orders, as the case may be.

2. The original complaint in No. 12798 did not involve any question at issue in the instant court proceeding. The issues now pending were raised by the Galveston Commercial Association's amended complaint (corrected) filed with the Commission in December, 1921. The material allegations of this complaint were, in substance, that the rail rates for the inland transportation of specified commodities moving in export, import, and coastwise traffic between all points in western classification territory and Illinois, on the one hand, and the port of Galveston, on the other, were unreasonable, and that the relation of the rail rates from and to this territory and to and from Galveston, on the one hand, and to and from Texas City, Houston, Beaumont, Port Arthur and Orange, Texas, and New Orleans, Louisiana, and Mobile, Alabama, on the other, was unduly prejudicial to the port of Galveston and unduly preferential of the

other ports mentioned. At the hearing on this complaint, however, the allegation of unreasonableness was withdrawn and, the other Texas ports having joined Galveston in the complaint, the charge of undue preference of such other Texas ports was also abandoned (R. 3348). The charge of undue preference of Mobile was not pressed, and the case thus came to the sole question of undue preference of the Louisiana ports, principally New Orleans, and undue prejudice to the Texas ports. The gravamen of the complaint was the practice of carriers serving New Orleans, principally the Texas & Pacific, in maintaining to and from that port on export, import, and coastwise traffic the same, or substantially the same, rates as are maintained by carriers serving Galveston on the same traffic moving through that port. The precise question therefore was whether this rate parity or equalization of the ports constituted undue preference of New Orleans to the undue prejudice of the Texas ports within the meaning of section 3(1) of the act.

Following the hearing on the amended complaint (corrected) the Examiner before whom it was held prepared his proposed report recommending that the complaint be dismissed. Division 2 of the Commission, to which the case was submitted, decided, without any material alteration of the Examiner's findings of fact, to the contrary; it found that the maintenance of a parity

of rail rates between New Orleans and Galveston on the foreign and coastwise commerce involved constituted an undue preference of the former to the undue prejudice of the latter in all instances where the distance to New Orleans exceeded the distance to Galveston by more than 100 miles (100 I. C. C. 123). It ordered that such preference and prejudice be removed by the establishment in such instances of rates to and from Galveston lower than those applying contemporaneously to and from New Orleans by the amount of certain minimum differences or "differentials" specified in the report.

Following this decision, however, and before rates in conformity therewith had been established, the Commission on petition of the Texas & Pacific and others reopened the case for rehearing and reconsideration. After a series of further hearings and after further consideration the Commission, with two Commissioners dissenting, three concurring in part and one not participating, handed down its 1927 report. This report affirmed in principle the prior decision of Division 2. However, it decreased the amounts of the minimum differences or "differentials" on some of the commodities and changed the requirement as to application of the differentials by providing that they should apply only as to points from which the distance to New Orleans exceeded that to Galveston by approximately 25 per cent or more. It also found that the Texas & Pacific and the Louisiana

Railway & Navigation (now Louisiana & Arkansas) system could not be charged with undue preference or prejudice under section 3(1) of the act and therefore exempted traffic to and from points on these lines from the order.

From this order the Commission, curiously enough, also exempted petroleum and its products, although in its report it did not find any traffic or transportation conditions which differentiated this traffic from the other commerce involved. Moreover, while this report in the main followed the Examiner's proposed report upon which the case was submitted, the Commission made several changes therein which are not without significance. Thus the Examiner had pointed out (R. 3503) that in determining whether carriers in meeting competition have gone beyond the limit under the law, the Commission must consider all circumstances and conditions which reasonable men would regard as affecting the welfare of the ports, the shippers, the carriers, and the producing and consuming public. He cited in this connection *The Import Rate Case, Texas & Pacific Ry. Co.* v. *Interstate Commerce Commission*, 162 U. S. 197, in which the Court held that in determining the question of discrimination between domestic and foreign commerce the Commission erred in disregarding the waterborne character of the latter, and set aside an order of the Commission requiring a parity of rates between the

two. The Commission in its final report deleted all but the opening sentences of this paragraph of the proposed report, and substituted therefor three new paragraphs (R. 3404-5). In the last of these it overruled the contention of the Texas & Pacific that in determining the matter of port equalization consideration should be given not only to the rail factors but also to the water factors which enter into the aggregate rates; for the decision of this Court cited by the Examiner it substituted a contrary decision of one of its divisions, saying: "In *Tobacco from Ohio River Crossings*, 73 I. C. C. 384, Division 2 found a similar contention to be without merit."[1]

Rates in accordance with the Commission's 1927 report were established in December of that year. Subsequently, however, the Commission upon various petitions again reopened No. 12798, principally upon the question whether traffic to and from points on the Texas & Pacific and the Louisiana Railway & Navigation system should be exempted from the finding of undue preference and prejudice made in the 1927 report. After further hearing and consideration, a majority of the Commission, three Commissioners dissenting and one expressing doubt, rescinded that part of the 1927 order

1 This point is the more important because, as will later be more fully shown, the Commission in a later case indistinguishable on principle, considered the water-borne character of foreign commerce and permitted, as to such commerce, an extensive equalization, and in many instances more than an equalization, of south Atlantic and gulf ports with the north Atlantic ports. **Export and Import Rates**, 169 I. C. C. 13.

which exempted the Texas & Pacific and the Louisiana Railway & Navigation system, and required the carriers to maintain as to points on their lines the differentials theretofore prescribed.

At the same time the Commission found in its cause No. 20685 that the maintenance by the defendant carriers, including these appellants, of an import rate of 48.5 cents from New Orleans to Dallas and Fort Worth, Texas, while they maintained a rate of 57.5 cents from New Orleans to Waco, Texas (the difference reflecting the minimum differential of 9 cents prescribed between the New Orleans and Galveston rates except as to points on the exempted lines) constituted undue preference of coffee roasters at Dallas and Fort Worth to the undue prejudice of complainants, coffee roasters at Waco, and directed the defendants to desist from maintaining from New Orleans to Waco a rate in excess of that from New Orleans to Dallas and Fort Worth.

The ultimate decision of the Commission therefore is that the voluntary maintenance on foreign and coastwise commerce moving through the port of New Orleans, by carriers serving that port, of rates the same or substantially the same as those maintained by other carriers on such foreign and coastwise commerce moving through the Texas ports, constitutes an undue preference of New Orleans to the undue prejudice of the latter ports in violation of section 3(1) of the Interstate Commerce Act.

And the final effect of the order is to prohibit almost altogether carriers which serve the port of New Orleans but do not serve the Texas ports, from participating in the movement of foreign and coastwise commerce to and from the interior via the Gulf of Mexico.

3. The proceedings in the lower court, the finding of probable jurisdiction and the specification of errors upon which this appeal is predicated are set forth at pages 19, 23 and 25, respectively, of the original brief of the Texas & Pacific.

BRIEF OF ARGUMENT

Introductory[1]

As has been heretofore pointed out (original brief of the Texas & Pacific, page 44), this proceeding, despite the size of the record, is not a fact case. Briefly, it is the position of appellants that the orders in controversy and the Commission's ultimate finding of undue preference and prejudice are both unsupported by and contrary to its basic findings of fact, and that the Court will have to do little more than look to such basic findings as they are set out in the Commission's reports. Ap-

1 In this brief reference to "the act" and sections, are to the Interstate Commerce Act, as amended, U. S. Code, Title 49, chapters 1 and 2, and sections thereof. By "New Orleans" and "Galveston" it is generally meant to refer to those places not merely as individual ports, but as representative and inclusive of all the Louisiana and Texas ports, respectively.

pellants do not seek to have the Court weigh conflicting evidence or substitute its judgment as to evidentiary facts for that of the Commission.

Because of the complexity of the ultimate issues it will clarify the discussion and serve to define the precise questions presented if we first lay to one side certain questions which are *not* involved:

1. There is no question of the lawfulness under section 1 of the act of the rates condemned by the orders in controversy. In other words, there is no contention, and the Commission did not find, that the equalized rates sought to be maintained by the appellant carriers are unreasonably high.

2. There is no question of the lawfulness of the condemned rates under the minimum rate provision of the act. That is, it is conceded that the equalized rates sought to be maintained by the appellant carriers are duly compensatory and wholly lawful in this respect.

In a word, the condemned rates lie within that "zone of reasonableness" within which, as the courts and the Commission have often observed, carriers are free in the exercise of their judgment to adjust their rates so long as no other provision of law is violated.

3. The traffic affected is strictly commerce passing *through the ports*, as to which the ports, as observed by Commissioner Hall in his dissent from the 1927 decision,

"are but outlets, way stations on the longer journey to or from foreign lands or our own distant coasts" (128 I. C. C. 400). There is no question of the relationship between New Orleans and the Texas ports *qua* producing or consuming centers.

4. From the preceding proposition it follows that there is no question of whether the traffic will move, nor upon what rates. In any event the traffic will move, and it will move upon aggregate charges equal to the sum of the water rates to and from the ports and the rail rates from or to the Texas ports. But since the water rates are, with unimportant and immaterial exceptions, the same to and from all the gulf ports involved, the effect of making the New Orleans rail rates higher than the Galveston rail rates is to make the aggregate charges via New Orleans higher than those via Galveston, and thus to force the traffic to move through the latter port; and this irrespective of the fact that the through rail and water distances as a whole are not materially different via either port.[1] Thus, to repeat somewhat, the question is not whether the traffic will move nor upon what rates, but whether it will be given the option of moving through New Orleans, or will be confined

1 An analysis of Exhibit A-140 (R. Vol. VI) reveals that as to points there shown in Kansas, Oklahoma and that part of Texas on and north of the Texas & Pacific, the through distances are less via New Orleans than via Galveston in approximately 45 per cent of the instances. Points in Arkansas and Louisiana were excluded because they are now generally equalized, and points south of the Texas & Pacific in Texas because they were not generally equalized before the orders herein.

to the Texas ports, and whether these appellants will be given an opportunity to participate in the movement of this commerce or will lose it to other carriers serving the Texas ports.

The following argument will follow the general outline of that in the original brief of the Texas & Pacific. In the interest of brevity, however, and to avoid undue repetition, the propositions set out in the original brief will be not separately treated; they will be regrouped and discussed under the major questions they present.

I

The orders in controversy should be set aside because the Commission has acted in disregard of and contrary to the evidence before it, has misapplied the law, and has exceeded the powers conferred upon it, and because the Commission's findings of fact do not sustain its conclusions of law and its orders based thereon.

It is elementary that an order of the Commission will be set aside: (1) If violative of constitutional limitations; (2) if not within the scope of its statutory authority; (3) if based upon a misinterpretation of the law; (4) if based upon an erroneous conception of the Commission's powers and duties; (5) if unsupported by competent evidence; (6) if contrary to or in disregard of unre-

futed facts established of record; (7) if, although purporting to be within the form of its delegated authority, the Commission's action is so unreasonable as in fact to be in excess thereof. These principles are so well established that discussion of them is unnecessary; the supporting authorities are cited at pages 71-3 of the original brief of the Texas & Pacific. It is the contention of appellants that the Commission has acted both in disregard of and contrary to the evidence before it, has misinterpreted and misapplied the governing law, has exceeded the powers conferred upon it under the Constitution and laws of the United States, and has in other respects entered orders which are unsupported and unjustified by the law and the evidence.

It is also settled that in an action to restrain the enforcement of an order of the Commission, the Supreme Court will determine whether as a matter of law the Commission's findings of fact sustain its conclusions of law and its orders based thereon. Supporting authorities are cited at pages 74-5 of the original brief of the Texas & Pacific.

II

Common carriers are empowered under the law to initiate their rates and rate policies, subject to correction only if it is determined after proper hearing that there is a violation of law; and in initiating their rates they are not bound to a strict mileage basis.

As well settled as the matters referred to in the first proposition, above, is the proposition that carriers have the right in the exercise of their managerial discretion to determine their rates and rate policies, subject to correction only if it is determined that some provision of law has been infringed.

This was the common law, and the rule was not changed by the original Act to Regulate Commerce nor by the Transportation Act of 1920. Perhaps the leading statement of the rule is that of the Circuit Court of Appeals in *Interstate Commerce Commission* v. *Alabama Midland Ry. Co.*, 74 Fed. 715, 723-4, which was quoted with approval by this Court on the appeal of the same cause, *Int. Com. Com.* v. *Alabama Midland R'y.*, 168 U. S. 144, 172-3:

> "* * * within the limits of the exercise of intelligent good faith in the conduct of their business, and subject to the two leading prohibitions that their charges shall not be unjust or unreasonable, and that they shall not unjustly discriminate so as to give undue preference or disadvantage to persons or

> traffic similarly circumstanced, the act to regulate commerce leaves common carriers, as they were at common law, free to make special rates looking to the increase of their business, to classify their traffic, to adjust and apportion their rates so as to meet the necessities of commerce and of their own situation and relation to it, and, generally, to manage their important interests upon the same principles which are regarded as sound and adopted in other trades and pursuits. *The carriers are better qualified to adjust such matters than any court or board of public administration*, and, within the limitations suggested, it is safe and wise to leave to their traffic managers the adjusting of dissimilar circumstances and conditions to their business" (emphasis supplied).

That no change in this respect was wrought by the change of public policy under the transportation act, referred to in *Dayton-Goose Creek R. Co.* v. *United States*, 263 U. S. 456, 478, is clear from *United States* v. *Illinois Central R. Co.*, 263 U. S. 515, contemporaneously decided. In the latter case it was said (l.c. 522): "A carrier is entitled to initiate rates and, in this connection, to adopt such policy of rate making as to it seems wise."

Nor has it ever been thought that in the exercise of their discretion in establishing rates, carriers should be bound by or held to a strict adherence to mileage considerations. Continuously since the time the question first arose it has been recognized that competitive conditions necessitate and sound business judgment advises

departures from strict mileage scales. This precise point arose at the time the first act to regulate commerce was in process of formulation. It received the specific consideration of the Senate Select Committee on Interstate Commerce, 49th Congress, First Session, which submitted a voluminous report to the Senate in January, 1886 (Sen. Rep. 46, Parts 1 and 2).

In the section of the report dealing with "Railroad Rates—the principles upon which they should be established and the limitations within which discrimination may be justifiable," the Committee observed (Sen. Rep. 46, Part 1, page 183):

> "It is sometimes argued that any discrimination on the part of the common carrier is necessarily unjust; that there can be no such thing as just discrimination. This is not the theory or principle of the common law. * * * In the practical management of a railroad * * * it is found impossible to avoid the exercise of discrimination, and, in consequence, the courts have always recognized the distinction between justifiable and unjust discrimination. Whether the discrimination practiced in a given instance is allowable or unwarranted is a question that can fairly be determined only by understanding the trade conditions and special circumstances that influence and govern the action of the railroad managers in that particular transaction."

It is plain that the Committee used the term "discrimination" in the sense of departures from strict mileage

bases in the establishment of rates, and its conclusion is to the effect that not all such departures are unwarranted or unlawful but that, on the contrary, they are frequently necessary and lawful, the necessity and lawfulness depending upon the "trade conditions and special circumstances" influencing the railroad managers. The Committee in reaching its conclusions not unnaturally leaned heavily upon the English commissions which had investigated the same subject. The report sets out at some length the various English investigations and the conclusions reached as a result thereof. Thus on page 56 (Sen. Rep. 46, Part 1) it is pointed out that among the important conclusions reached by the Royal Commission appointed in 1865 was one that "it would be 'inexpedient, even if it were practicable, to adopt any legislation which would abolish the freedom which railway companies enjoy of charging what sums they deem expedient within their maximum rates, when properly defined, limited as that freedom is by the traffic act'." The Senate Committee also commented upon the investigation by the Joint Select Committee (of Parliament) appointed in 1872, and observed (page 57) that:

> "Other important conclusions were reached by the Committee as follows:
>
> "'That a system of equal mileage rates, or charges in proportion to distance, was inexpedient and impracticable for the following reasons:

"'(a) It would prevent railway companies from lowering their fares and rates, so as to compete with traffic by sea, by canal, or by a shorter or otherwise cheaper railway, and would thus deprive the public of the benefit of competition, and the company of a legitimate source of profit.

* * * * *

"'In short, to impose equal mileage on companies would be to deprive the public of the benefit of much of the competition which now exists, or has existed, to raise the charges on the public in many cases where the companies now find it to their interest to lower them, and to perpetuate monopolies in carriage, trade, and manufacture in favor of those rates and places which are nearest or least expensive where the varying charges of the companies now create competition.'"

Here is a pointed, unequivocal statement of the inexpediency and impracticability of forcing adherence to strict mileage considerations, and, by necessary implication if not expressly, a disavowal of any intent to do so. And if it be argued that the original bill reported by the Senate Committee (S. 1532) was not the same as the bill finally passed by Congress, the answer is that the portion with which we are here concerned, section 3(1), was the same with exception of a slight change in punctuation.[1] And this paragraph has not been changed by subsequent legislation.

1 Shown by reference to Senate Bill 1532, introduced by Senator Cullom on Feb. 16, 1886, as it appears in the files of the United States Senate Library in Washington.

Reports of Committees of House or Senate may be looked to as an exposition of the legislative intent in a case where otherwise the meaning of the statute is obscure. *Duplex Co.* v. *Deering*, 254 U. S. 443, 474. They are judicially noticeable, *Arizona* v. *California*, 283 U. S. 423, 454, and may be considered even though not made a part of the record below. *New York Indians* v. *United States*, 170 U. S. 1, 32; *Jacobs* v. *United States*, 45 Fed. (2d) 34, 36. The quoted portions of the report of the Senate Committee preclude beyond any question the notion that Congress intended to prohibit departures from strict mileage considerations. They show, to the contrary, that there was a definite, considered intent to allow departures from "equal mileage" for the purpose of meeting competition, particularly where, as in the instant case, charges in proportion to distance would deprive the public of the benefit of competition and the company of a legitimate source of profit, and would perpetuate monopolies in carriage, trade or manufacture.

It is highly significant that in a decision released since this case was first submitted to this Court, the Interstate Commerce Commission has recognized and applied this precise principle. In *Lake Cargo Coal Cases, 1930*, 181 I. C. C. 37, complainants, coal operators in Ohio and Pennsylvania, contended that the rates charged their competitors in more southerly fields on coal for transshipment on the Great Lakes, did not sufficiently reflect

the difference in distance between the two fields, and were therefore unduly prejudicial to complainants and preferential of their competitors. But the Commission dismissed the complaint, observing (l.c. 54):

> "In the exercise of their managerial discretion under the stress of competition, carriers often establish rates and rate relationships which we could not require them to establish. When such rates appear as a whole to be in the public interest, they should not be condemned merely because they are not based on the same distance scale of maximum reasonable rates."

It is contended by appellees, however, that the Commission by the orders in controversy has not compelled a strict adherence to mileage; and it is true that at page 380 of its 1927 report (R. 3405) there is a half-concession that in the rates on traffic passing through the ports distance may be disregarded to a greater extent than in the case of domestic rates. It is plain, however, that the Commission did not *act* with regard for any such consideration. The water rates to and from the affected ports, which it held could not be considered, are the same; hence any differentials in the New Orleans rail rates over the Galveston rail rates make the aggregate charges through New Orleans greater than through Galveston and effectively divert traffic to the latter port. This diversion was the avowed purpose of the pres-

cribed differentials, and it was well known that they would have that effect, even though they are less than the differences which would result under domestic scales of rates for the same differences in distance. The amount of the differentials is immaterial, and the Commission has in fact ignored the competition which these appellants seek to meet and in effect imposed on them "equal mileage."

Since the orders in controversy condemn not a disparity but an equality between the New Orleans and Galveston rail rates, they necessarily rest on the assumption that a departure from a mileage scale, even under the stress of competition, constitutes undue preference of the place in favor of which it incidentally operates and undue prejudice to the place against which it incidentally operates. But this assumption is contrary to the law and, as we have seen, to the intent of Congress in enacting the statute. The foundation for the orders therefore fails, and they should be set aside.

III

The maintenance of a parity of rates between New Orleans and Galveston on commerce moving through them is not discriminatory because, inter alia, the relation of the ports to such traffic is not such that the former may be considered a locality preferred and the latter a locality prejudiced within the meaning of section 3 (1).[1]

It is a fact of fundamental, if not controlling, importance, that the commerce involved in this case passes *through the ports*. The ports are not, as to this traffic, producing or consuming centers. As the Commission itself remarked in its 1927 report: "A port is neither the destination nor the origin of traffic passing through it. It levies toll on the traffic, in substantially the same manner as do common carriers, in its charges for use of its facilities in the transfer of traffic between rail and water carriers" (R. 3391; 128 I. C. C. 369). The apparent and avowed interest of the ports is in the toll they so levy. The ports are not shippers; indeed, to quote again Commissioner Hall's dissent from the 1927 report, "* * * the producers and shippers who pay [the] rates seem to have been lost from sight" (128 I. C. C. 399). These appellants submit that under the circumstances

1 In that part of its order inviting attention to this question, the Court referred also to section 15(1), but inasmuch as that paragraph is a purely adjective provision, in so far as undue preference and prejudice are concerned, **York Mfgrs. Asso. v. P. R. R. Co.**, 107 I. C. C. 219, 232, the discussion here will be confined to section 3(1).

the relationship of the ports to the traffic affected and to the rates condemned by the orders in controversy is such that the Louisiana ports may not be considered localities preferred nor the Texas ports localities prejudiced within the meaning of section 3(1).

It is true that in enacting the act to regulate commerce one of the primary purposes of Congress was to extirpate discrimination. But the word was not used vaguely or indefinitely; it has a distinct meaning, *viz.:* inequalities in the assessment of charges. The discriminations aimed at were thus those in the treatment of shippers. The competent portions of the proceedings in Congress at the time the original bill was pending are persuasive that this was the concept in the mind of that body and that there was no intent to extend a helping hand to those, such as wharfingers and warehousemen, having no relationship to commerce save a parasitic one.

Senator Cullom was Chairman of the Senate Committee and fathered the original bill introduced in the Senate. His remarks are plainly entitled to weight in ascertaining the intent of Congress. In explaining the original bill (S. 1532) he pointed out that the primary purpose was to eradicate discriminations and that sections 2, 3 and 4 were particular means to this general end. "The second, third, and fourth sections specifically prohibit and declare unlawful the various forms of unjust discrimination between persons, between different

commodities or particular kinds of traffic, and between places." (Congressional Record, Vol. 17, Part 4, page 3471; 49th Congress, First Session).[1] But sections 2 and 4 expressly relate to inequalities in the assessment of charges, *i. e.*, inequalities in the treatment of those having a shipping relationship to the traffic. It would seem, therefore, that section 3, being of the same nature and designed for the same purpose as 2 and 4, was intended to operate similarly; and indeed this very thought runs through the record. Thus of section 2 Senator Cullom said that the object was "to place all *shippers* upon an absolute equality *as to the rates charged for a like service* under substantially similar circumstances" (emphasis supplied). Commenting on the relationship between the second and third sections, he observed, "The third section is broader and more general in its terms, and should perhaps have been made the second section, as it contains a general prohibition of every variety of unjust discrimination * * *. This covers in general terms, though by no means so completely, the provisions of section 2 as to discriminations against persons, but goes further and includes discriminations against localities or particular descriptions of traffic." And pointing out the

1 Explanatory statements of committee members are in the nature of supplemental committee reports and therefore, like the latter, may be looked to as an exposition of the legislative intent. **Duplex Co. v. Deering**, 254 U. S. 443, 474. It is understood also that, like committee reports and other public documents, they are judicially noticeable and may be considered even though not of record. Cf. New York Indians v. United States, 170 U. S. 1, 22; Jacobs v. United States, 15 Fed. (2d) 34, 36; **Arizona v. California**, 283 U. S. 423, 454.

relationship between sections 3 and 4 he stated: "Section 3 in *general* terms prohibits unjust discriminations against localities, but section 4 is *even more specifically* directed against that evil, by prohibiting a greater aggregate charge for a shorter than for a longer distance over the same line * * *." (Congressional Record, Vol. 17, Part 4, page 3472; 49th Congress, First Session; emphasis supplied). If section 3 is simply a general statement of the prohibition of which sections 2 and 4 are specific applications, it necessarily follows that to bring one within the operation of section 3 he must show that, *qua shipper*, he has been subjected to unjustified inequality. Section 3 can not, any more than sections 2 and 4, be extended to those whose only relationship to commerce arises from their levying toll upon it as it passes through their hands.

Proceedings in the House also disclose that the intention of Congress in enacting the discrimination provisions was to prevent unjustified inequalities among those having a shipping relationship to the traffic. After S. B. 1532 passed the Senate and was referred to the House, it was referred by the House to the Committee on Commerce. This committee reported it back with an amendment striking out all after the enacting clause and substituting the provisions of the House Bill which the House Committee had previously reported. (Congressional Record, Vol. 17, Part 7, page 7277).

Mr. O'Ferrall, a member of the House Committee, speaking on this bill by sections, said of the first section, the discrimination provision:

> "The first section provides that no discrimination shall be made by any railroad in favor of one person over another in rates, facilities of transportation, receiving, delivering, storing and handling of like property * * *.
>
> "This section provides that A shall not be charged more than B, and that he shall have the same facilities and accomodations. * * * It declares that the small shipper * * * shall send his little upon the same terms in all respects as the large shipper * * *." (*id.* page 7294).

Again, Mr. Reagan, chairman of the House Committee, in closing the debate on that question:

> "Adopt the principles laid down in this bill * * * and we would say to these companies: 'You must charge for all distances what will carry your freight. If you can make something by charging for the shorter [longer?] distances an amount equal to that charged for longer [shorter?] distances, you may do it; but you shall not compel a part of the producers of this country * * * to enrich another by paying for their transportation.'" (*id.* page 7298).

These words in their precise application were directed to the fourth section, but like the explanatory statements in the Senate, their very definite implication is that the

discriminations intended to be avoided were those *among shippers.*

It is submitted that the principle upon which the Congress acted was the prevention of unjustified inequalities in the assessment of charges, and that there can not be read into the act any intent to allow those who merely levy tribute on commerce to seize upon the discrimination sections to their profit. If there is any doubt about the matter, it is removed by two statements explanatory of the substitute bill reported by the Joint Committee and finally enacted by Congress. In that measure the third section, as heretofore pointed out, was the same as in the original Senate Bill and as it now reads. The House Conferees' report on the Joint Committee Bill dealt in detail with the changes made in the House Bill. With relation to the third section that report said: "The third section of the substitute embraces substantially the provisions of the bill of the House, in requiring equal facilities and advantages for all *shippers*, without exception, * * *." (Congressional Record, Vol. 18, Part 1, page 698; emphasis supplied).

Most conclusive of all, however, is the explanatory statement of Senator Cullom during final discussion of the substitute bill. The precise question now at issue, *viz.*, the equalization of ports on traffic passing through them, arose. Senator Hoar, of Massachusetts, was vastly disturbed over the possible effect of the act on the

foreign commerce of the port of Boston, which consisted in large part of exports from parts of the country located from 150 to 250 miles nearer to New York, Philadelphia and Baltimore than to the Massachusetts port. He anxiously inquired of the Committee Chairman whether the fourth section would not either compel a reduction of the intermediate rates between New York and Boston to the New York basis or necessitate a raise in the Boston rates and thereby put that port out of foreign business. Senator Cullom, however, understood the inquiry to relate to the more general question of the right of the carriers under the act to continue equalization of ports on foreign commerce. Speaking to that point, he stated, explicitly and unequivocally, that the bill would not have the effect of preventing such equalization (Congressional Record, Vol. 18, Part 1, pages 485-86; emphasis supplied):

> "Mr. Cullom: Mr. President, it may be said to be rather unfortunate that Boston is a little farther away from the center of gravity than New York; but I do not think, myself, that there is anything in this bill which prohibits a railroad from carrying to Boston just as cheaply as it carries to New York from Chicago or Omaha or San Francisco, *and there is not anything now that prevents it.*"

When the Senator from Massachusetts raised the question of the possible effect of the fourth section on the

foreign commerce of Boston, he foreshadowed the precise problem which was to be presented to the Commission forty-three years later in *Export and Import Rates*, 169 I. C. C. 13; and it is highly significant that in deciding that problem the Commission not only answered the Senator's inquiry in the negative, but, like Senator Cullom, went further and conclusively denied the notion that the act prohibits a voluntary equalization of the ports on traffic passing through them. The decision in that proceeding was released after the last decision of the Commission in the instant case and is directly contrary thereto. It thus evinces not only the erroneous construction of the law adopted by the Commission, but its arbitrary and unreasonable action, herein. On this account it will be analyzed at some length.

That proceeding was an application by certain rail carriers serving the south Atlantic and gulf ports, generally referred to as southern and southwestern carriers, for relief from section 4 of the act so as to permit them to maintain on foreign commerce low competitive rail rates between such ports and an area lying, roughly, west of a line drawn through Pittsburg and Buffalo, north of the Ohio River, east of the Missouri River and south of the international boundary; and to maintain higher rates between such ports and points intermediate to the territory so defined. The rates sought to be maintained to and from the defined territory were generally

the same as or less than those applied by eastern carriers between that territory and the north Atlantic ports. Thus an equalization and in some instances what might be termed a sub-equalization of the south Atlantic and gulf ports, was proposed. This equalization, or sub-equalization, of the rates was essential if the applicant carriers were to participate in the movement of export and import commerce between foreign countries and the defined interior territory; and the object of the applicant carriers was to establish such competitive rates to and from the defined territory while maintaining the normal and higher level of rates to and from intermediate points. Primarily, therefore, the question was whether the situation presented constituted a "special case" within the meaning of the fourth section and justified a departure from the long-and-short-haul clause. However, the case also necessitated a finding on the question whether the equalization of south Atlantic and gulf ports with the north Atlantic ports, in disregard of distance and of the cost of operation, would constitute an undue preference of the former ports to the undue prejudice of the latter, because the Commission of course can not authorize a fourth-section departure unless the rates to be established thereunder are also lawful in all other respects. This issue was squarely raised by both the eastern carriers and the north Atlantic ports, both of which opposed the application (169 I. C. C. 40, 43). As the case presented itself to the Commission, there-

fore, granting of the application would necessarily amount to a finding that the proposed equalization would not unduly prefer the south Atlantic and gulf ports to the undue prejudice of the north Atlantic ports.

The Commission granted the relief sought, subject only to certain provisions designed to insure the maintenance of compensatory rates to and from the defined territory (169 I. C. C. 57). And it did so with specific advertence to the question of undue preference and prejudice as among the ports. Thus at pages 44-45 of the report it observed:

> "There is no doubt that any increase in the movement of foreign commerce to and from the interior territory via the south Atlantic ports would be accompanied by a corresponding relative decrease in the movement through the northern ports. However, unless the rates which produce this result are unduly preferential or unduly prejudicial or otherwise in violation of law, or contrary to the general public interest, as expressed in the law, the fact that they may divert traffic from one port or group of ports to another is no bar to granting fourth-section relief."

And, again, on page 52 of the report:

> "The object of the carriers seeking the relief is to retain and if possible increase traffic moving over their lines. If the relief should be granted and they are successful in their efforts to secure additional traffic, commerce now moving or which might move

> through some ports would be diverted through others. That the proposed rates might have that result, however, is a matter for consideration in this case only to the extent that it may affect the determination of the question as to whether those rates would result in undue preference of some ports and undue prejudice to others."

The Commission thus recognized that the question of undue preference of the south Atlantic and gulf ports to the undue prejudice of the north Atlantic ports was before it, and that in granting the application it was deciding that question in the negative.[1]

The case is indistinguishable on principle from that at bar. In the instant case the Commission denied these appellants the right to equalize the ports in disregard of distance. In *Export and Import Rates* it in effect found lawful an equalization of ports in disregard not only of distance but of cost of service. This is true because traffic and transportation conditions on the lines of the eastern carriers are much more favorable and result in a lower cost of operation than on the lines of the southern and southwestern carriers. As the Commission observes on page 31 of its report, the domestic rates

1 On page 52 of the report the Commission seeks to argue that the proceeding was not one for the purpose of equalizing the ports. Superficially this is true, because, as has been pointed out, the primary question was whether a departure from the long-and-short-haul clause was justified. But the avowed object of the applicant carriers was port equalization, and the Commission in granting the application in effect—and knowingly—found lawful a rate structure designed for that specific purpose.

(differences in which in various areas reflect the differences in traffic and transportation conditions and operating expenses) are considerably lower via the lines of the eastern carriers between the north Atlantic ports and the interior territory than via the lines of the southern carriers between the south Atlantic and gulf ports and the same territory; and as it pointed out on page 34, the prescribed rates in the Southwest are higher than in the Southeast. Thus both the southwestern and southern carriers competed under the handicap of a higher cost of operation than the eastern carriers. And in approving an equalization of ports in disregard not only of distance but of these higher costs the Commission recognized that competition justifies an even greater inequality of treatment from the transportation standpoint than is present in this case, in which a disregard of distance alone is proposed.

Nor can the decision be distinguished on the theory that the proposed competitive rates were not to be participated in by both sets of carriers. As the Commission pointed out (l.c. 17) and as Commissioner Eastman observed in his dissent (l.c. 66), the adjustment of rates which the Commission was approving to a very considerable extent could not be made effective without the participation of the eastern carriers. The Commission thus contemplated that there would be joint participation in both sets of rates—here again, by finding

that there would be no undue preference or prejudice, going squarely contrary to its holding in the case at bar.[1]

IV

Inasmuch as these appellants neither serve the Texas ports nor have any controlling voice in fixing rates therefrom or to, they may not be charged with preference or prejudice nor subjected to an order under section 3 (1).

(a) In the analysis of this case the first question in logical order is whether there is undue preference of New Orleans to the undue prejudice of Galveston within the meaning of section 3(1). It has been seen that this question must be answered in the negative both because it was not the intention of Congress to prevent carriers in adjusting competitive rates from disregarding mileage; and because the relationship of the ports to the traffic involved is not such as to call into play section 3(1). Assuming the contrary, however, the next question is whether these appellants may be charged with the discrimination thus assumed to exist.

Upon this question the Commission has shown a decided tendency to vacillate. In the 1925 report it stated

1 This point will be mentioned later under the discussion of responsibility for undue preference and prejudice. It may be noted in passing that prior to the decision in **Export and Import Rates** there had been equalization of the south Atlantic and gulf ports with the north Atlantic ports for years, participated in by both sets of carriers, and apparently no one ever supposed that this situation created undue preference or prejudice. See 169 I. C. C. 18 **et seq.**

(R. 3358-59) that both the Texas & Pacific, serving New Orleans, and the International-Great Northern, serving Galveston, are controlled by the Missouri Pacific; and on the basis of this supposed community of control it subjected the former to the order entered. The cases cited in support of that finding, however, had nothing to do with the Texas & Pacific and there was, in fact, no evidence of record to support the Commission's conclusions. At the 1926 hearings evidence was taken on that point and as a result the Commission in the 1927 report found that "the Texas & Pacific is an independently operated carrier and is not to be regarded as a part of the Missouri Pacific system;" which finding it followed with the conclusion that: "Since the Texas & Pacific, therefore, does not serve any Texas port, and has no controlling voice in fixing the level of the assailed rates to any of the Texas ports, it cannot be held guilty of undue preference or prejudice * * *. This is also true of the Louisiana Railway & Navigation system" (R. 3406; 128 I. C. C. 381). The carriers were consequently exempted from the order entered at the time as to traffic to and from points on these lines.

In its 1929 report the Commission again reversed itself and rescinded the exemption made in favor of these appellants. It did so, however, without any change in its findings of fact. The intercorporate relationship of the Texas & Pacific and the Missouri Pacific was the

subject of testimony at the 1929 hearing, but the Commission did not change its finding on this point; nor did it make any different finding in regard to the absence of control of the Texas & Pacific over the rates to and from the Texas ports. Indeed, it has never been and is not contended that the Texas & Pacific participates in an effective controlling way in these rates.[1]

In considering the question thus raised we come, at the outset, to the proposition that in adopting the wording of the English Act as to preference and prejudice, Congress presumably had in mind the construction of such words adopted by the English courts. This is important because in no English case had it been held that in a situation such as that at bar, the carrier maintaining the competitive rate was chargeable with undue preference. The tenor of the English decisions was definitely to the contrary. The cases are abstracted at pages 77 *et seq.* of the original brief of the New Orleans Joint Traffic Bureau and others; the synopses show that the definite implication of the English decisions, both before and after 1887, was that in order to be chargeable under the preference and prejudice clause, a carrier must

1 The Texas lines can reduce the rates to and from the Texas ports without the concurrence of the New Orleans lines, but the latter can not reduce such rates even as to their local stations without the concurrence of one or more of the Texas lines (R. 3105, 3116, 3143-44). In at least one instance the Texas lines refused to join the New Orleans carriers in reducing the rates to the Texas ports (R. 3089, 3112); and appellees concede that the differentials prescribed by the Commission were in practically all instances established by increasing the New Orleans rates.

be responsible for both the allegedly prejudicial and the allegedly preferential rates.

Next occurs the consideration that in reaching its 1929 decision as to the liability of these appellants for the supposed prejudice to Galveston, the Commission avowedly overturned the doctrine, generally referred to, from the style of the leading case on the question (*Ashland Fire Brick Co.* v. *S. Ry. Co.*, 22 I. C. C. 115), as the principle of the *Ashland case*, to which the Commission had adhered since its very beginning. That doctrine was that a carrier must be responsible for both the preferential and the prejudicial rates if it is to be liable under section 3(1). The Commission renounced this principle after consideration of *St. Louis S. W. Ry. Co.* v. *United States*, 245 U. S. 136, *Central R. Co.* v. *United States*, 257 U. S. 247, *United States* v. *Illinois Central R. Co.*, 263 U. S. 515, and *Chicago I. & L. R. Co.* v. *United States*, 270 U. S. 287; which, it concluded, show that its conception of its powers under section 3, as applied in the *Ashland case*, was too narrow. Those decisions are not in reality inconsistent with the Ashland principle and do not support the extension of its authority sought to be made by the Commission. But the point now desired to be emphasized is that in a long line of cases decided after the latest of those decisions, and including, even, decisions subsequent to the Commission's 1929 report herein, it has applied the doctrine

of the *Ashland case*. The instant case can only be regarded as an almost unique aberration from that principle.

The cases decided between *Chicago I. & L. R. Co.* v. *United States*, *supra*, and the 1929 report herein, and in which the Commission applied the doctrine of the *Ashland case*, are listed at pages 93 to 94 of the original brief of the New Orleans interests. They begin with *Alabama Mining Institute* v. *Ill. C. R. R. Co.*, 109 I. C. C. 740, and number no less than fifteen. Moreover, decisions released even after the last decision of the Commission in the instant case, indicate a return to the doctrine of the *Ashland case* and a disavowal of the rule applied by the Commission against these appellants.

Export and Import Rates, 169 I. C. C. 13, decided approximately a year after the Commission's 1929 decision herein, has already been discussed. It will be recalled that therein the Commission in effect found lawful a rate structure designed to equalize the south Atlantic and gulf ports with the north Atlantic ports on foreign commerce, in disregard not only of distance but of cost of operation (*ante*, pages 29-33). As has been mentioned, the authority granted contemplated the participation of the eastern carriers in both sets of rates. The situation was identical with that in the case at bar in that the eastern carriers, like these appellants, would be par-

ticipating in both sets of rates, although, like these appellants also, responsible only for one set.[1]

Again within the last few weeks the Commission has declined to carry to its logical conclusion the rule applied against appellants. The following quotation from *Paper and Paper Articles between Western Trunk Line Points*, I. & S. Docket No. 3724 (unreported), decided August 12, 1932, is illuminating (emphasis supplied):

> "The most serious charge made against the proposed rates is to the effect that they are unduly preferential in that they will prefer Wisconsin producers and prejudice competing mills located east of Chicago. The important market, of course, is Chicago, and it is into Chicago that the carriers are attempting to protect their business.
>
> "*Except in a purely incidental degree and to an almost negligible extent*, the element of a common responsibility for, or participation in, rates both from the Eastern and Western mills is lacking. It is entirely lacking at Chicago, the real point of interest for the contending mills. Protestants themselves stressed throughout the record the importance of the Chicago market which is said to be next to the largest if not in fact the largest, market for printing and wrapping paper in the United States.
>
> "That each of these two groups of carriers has the right to pursue independently of the other its

1 Of course, as has already been suggested, the decision in **Export and Import Rates** is explicable, aside from the point now under discussion, on the principle that a **voluntary equalization** of ports cannot constitute undue preference or prejudice. In any event it is squarely contrary to the instant case and persuasively shows the arbitrary and unreasonable character of the Commission's action herein.

own general policy with respect to rate-making was recognized by us in the reopening of the *Michigan Paper cases* in connection with the *West Virginia case* in disposing of the complaint with respect to grouping of the Wisconsin mills as compared with the distance or mileage which was concurrently applied from Michigan mills. In that connection we said:

"'The difference in treatment of the Wisconsin and the Michigan producing points in this respect is clearly due to a difference in the policies of the two groups of carriers serving them. *These carriers are independent of each other and not responsible for each others policies concerning grouping. West Virginia Pulp & Paper Co.* v. *B. & O. R. Co.*, 165 I. C. C. 349, 367.'"

Now it is too plain to require argument that the question is not one of degree. If there is preference and prejudice, and if there is common participation by the carriers, then under the principle announced in the 1929 report herein the rates fall under the condemnation of section 3(1); and whether the participation is small or great, or "incidental" (whatever that may mean), is quite immaterial.

(b) The decisions of this Court upon which the Commission relied in overturning the doctrine of the *Ashland case* are discussed on pages 96 *et seq.* of the original brief of the Texas & Pacific and little need be added thereto. The principal considerations are: (1) that in *St. Louis*

S. W. Ry. Co. v. *United States*, 245 U. S. 136, the order in controversy prescribed the then existing Cairo rate as a reasonable maximum to Paducah; the order was under section 1, and its validity under that section was the real issue in the case; furthermore, the Court's remarks anent discrimination were to the effect that a carrier's *rails* need not reach the prejudiced point in order for it to be charged with discrimination. This these appellants do not dispute. But they do contend, and the Court did not hold otherwise, that a carrier must exercise some effective control over the rates to the allegedly prejudiced point, either by serving that point with its own rails or in some other manner; (2) that in *Central R. R. Co.* v. *United States*, 257 U. S. 247, the Court held that the appellants were not subject to a section-3 order because they were not jointly responsible for the practice found to be preferential, and therefore anything that was said with reference to liability under section 3 was obiter (the decision properly construed tending to support appellants' contention herein); (3) that in *United States* v. *Illinois Central R. Co.*, 263 U. S. 515, as well as in the companion case contemporaneously decided, *Wyoming R. R. Co.* v. *United States*, the trunk lines were in control of the rate adjustment from both the allegedly preferred and the allegedly prejudiced points; (4) that in *Chicago I. & L. R. Co.* v. *United States*, 270 U. S. 287, the appellants were jointly responsible for the discrimination because each controlled, and

was responsible for, its policy in refusing to interchange with the South Shore, and for its policy in interchanging with the other lines; consequently, the order left them a real alternative. They were free to remove the discrimination by discontinuing interchange with each other at Michigan City or by establishing interchange with the South Shore at that point. The case is readily distinguishable from that at bar, in which these appellants have no controlling voice and are not responsible for the rates to the Texas ports and in which the "alleged alternative is illusory" (257 U. S. 258).

(c) From a logical standpoint what is the difference between non-participation in rates and participation in them but no effective control over them? On the Commission's reasoning, if the Texas & Pacific, *e. g.*, did not participate in rates to the Texas ports at all, it could not be liable under section 3; and this is of course correct. Yet if the Texas & Pacific did not participate in such rates, the rates would be there, and on the same level, just the same. The only effect of participation is to enable the Texas & Pacific to raise the rates to and from local points on its line; but this is not what is sought and does not affect the problem. To cure the supposed prejudice by changing the rates to the Texas ports necessitates a reduction in those rates. The question then becomes whether the Texas & Pacific has sufficient control over the rate structure to accomplish such

reductions. As has been pointed out, it has not (footnote page 36). Thus the only real alternative left is that which would exist if the Texas & Pacific did not participate in the rates to the Texas ports at all—viz., an increase in the New Orleans rates. Therefore, so long as the Texas & Pacific participates but not in a controlling way, the situation is no different from that which would obtain if it did not participate at all. Logically the same conclusion—that there is no liability—must follow in the former event as in the latter.

This question is not a logical quibble; it is of extreme practical importance. When the carrier charged with discrimination has a controlling voice in both sets of rates it may remove the alleged discrimination either by lowering the one, or raising the other, or both. The ability to adjust the rates to the needs of the traffic is not lost. On the other hand, when it has a controlling voice only in the allegedly preferential rates, control of those rates may be taken out of its hands. The effect of a section-3 order may be, and it was in this case, to place the carrier in a straight-jacket.

It is not contended here, as it was in *Central R. R. Co. v. United States, supra*, that appellant carriers have the alternative of withdrawing from participation in the joint rates. The orders herein, like the one in that case, fail so to provide in terms. On the contrary, they affirmatively contemplate, even though they do not expressly require, continued participation. These appellants are

under legal compulsion to establish through routes, section 1(4), and are under potential compulsion as a matter of law, section 15(3), and present compulsion as a practical matter, to continue joint rates. The situation therefore is that they are sought to be criminally or quasi-criminally charged for a situation into which they are forced and from which they have no practical means of withdrawing.

In the final analysis, in order to hold these appellants guilty of discrimination as to traffic originated upon and destined to points on their lines, they must be found to have committed an act illegal under section 3. Considering this, the conclusion must follow that an interpretation and application of that section which would ignore the practical aspects and at the same time declare illegal an act virtually if not entirely necessitated by the statute itself, would be wholly unjustifiable.

V

The real purpose and effect of the Commission's orders are not to remove a transportation discrimination but to counteract supposed natural or commercial advantages of New Orleans over the Texas ports; the orders are therefore beyond the power of the Commission.

These appellants do not concede that a departure from mileage considerations for the purpose of *equalizing*

rates in order to meet competition falls within the purview of section 3(1). It has been pointed out that in enacting the statute, Congress did not intend to impose "equal mileage" on the carriers; nor, according to the leading spokesman on the subject, Senator Cullom, to prevent equalization of the ports on traffic passing through them. We may lay this to one side, however, and assume the correctness of the Commission's finding that because of the differences in distance a rate parity constitutes discrimination, for the purpose of determining whether the Commission's orders were in fact based on that supposed discrimination and designed to remove it.

Significantly enough, the very beginning of the Commission's reasoning is the premise that New Orleans has certain natural advantages over the Texas ports. This, it observed, "in itself warrants careful scrutiny of a rate adjustment which is alleged to be unduly prejudicial to the port least favored by natural advantages" (100 I. C. C. 121). And even more pointedly it remarked in the 1927 report (128 I. C. C. 368-9):

> "While such commercial advantages as are above enumerated can not be determinative of rate relationships, and few of them can be taken into consideration in passing upon the question of undue prejudice, they serve to confirm the impression that the advantages of New Orleans, whether natural or acquired by progressive enterprise, are so superior

to those of the Texas ports that an affirmance of the findings in the original report would not be likely to cause serious injury to the port of New Orleans.

"* * * Healthy competition is no less important between ports than between rail or water carriers. There is, however, a limit beyond which the disregard by rail carriers of the geographical advantages of one port in favor of another will impair rather than promote healthy competition between the ports. There is much ground for believing that a policy of port equalization, if carried beyond reasonable limits, has the effect of strengthening unduly, at the expense of others, those ports which by reason of natural or acquired advantages have attained commanding positions in the export and import trade * * *."

The conclusion is inescapable that underlying the Commission's decision was the thought that New Orleans has certain natural or commercial advantages over the Texas ports which should be offset or counteracted. And the reasoning of the Commission also has in it this paradox, that the Commission finds that New Orleans has natural or commercial advantages, yet it ascribes the supposed undue growth or strength of New Orleans as a port, not to such advantages, but to the "rate advantage" supposed to have been given it by these appellants—even though no advantage, accurately speaking, is accorded at all, but a mere equality!

With such considerations in mind it is highly significant that the Commission did not find that as to *all* commodities a parity of rates creates discrimination. It exempted, in the instant case, petroleum and its products, and has since exempted blackstrap molasses. *Blackstrap Molasses from Louisiana Points*, 171 I. C. C. 583; *Blackstrap Molasses from Louisiana Ports*, 171 I. C. C. 591. Now since discrimination must be measured by the "transportation standard," *United States* v. *Illinois Central R. Co.*, 263 U. S. 515, 524, it is obvious that prescribing differentials on certain commodities and permitting an equalization on others is illogical and arbitrary and amounts to a regulation of commercial or industrial conditions, unless there is a distinction between the two classes of commodities from a transportation standpoint. But neither the record nor the Commission's findings reveal any such distinction. The reasons for the exemption of petroleum and its products, as revealed by the Commission's 1927 report, are as follows: (1) that the effect of differentials on the Louisiana exporters would be "serious" (128 I. C. C. 374); (2) that differentials would do serious injury to the independent refiners (*id.* 376); (3) that under equalization the Texas ports have secured a "fair share" of the business (*id.* 374); (4) that since petroleum moves principally in private tankers the benefit of equalization to the Texas ports would be small (*id.* 374); (5) that as to pe-

troleum and its products, New Orleans has no superior advantages as compared with the Texas ports (*id.* 372).[1]

Such considerations, of course, relate in no manner whatever to the transportation standard. They are conclusive, particularly the last three, that the Commission's orders were not directed at the removal of discrimination from a transportation standpoint, but at offsetting supposed advantages of New Orleans in those instances where the Commission believed such advantages to exist and where it thought the manipulation of rates would result in some benefit to the Texas ports. As a matter of fact, from the transportation standpoint there is more warrant for equalizing rates on the general run of traffic moving in box cars than on petroleum moving in tank cars. The record shows that the supply of box cars available from the inbound movement to New Orleans is generally insufficient to meet the needs of the outbound movement therefrom, and that in consequence it has been necessary to move empty cars from points in

1 The Commission's ultimate finding (page 388) was that the parity of rates does not as to petroleum and its products result in substantial injury to the Texas ports. This, however, is obviously merely another way of stating its opinion that these ports are getting a "fair share" of this traffic and that it could confer no benefit on them by regulation of the rates thereon. The Commission had theretofore found (128 I. C. C. 366) that the establishment of differentials in favor of Galveston would be even more certain to divert practically all the tonnage from New Orleans in the case of petroleum than in the case of the general run of traffic. This, in connection with other findings, demonstrates that its exemption of this tonnage was not based on the belief that Galveston was not being injured in the sense of losing tonnage, under equalization, which it would get under a differential adjustment, but on the fact that getting the additional petroleum tonnage would not **build up the port** as the Commission desired to do.

Texas to Louisiana for outbound loading (Exhibits A-45 to A-48, R. 967-71; Exhibits A-53 to A-56, R. 1010-16). Hence box-car traffic which under equalized rates might be loaded for New Orleans in cars which would have to be moved in any event, would be "added traffic" handled at an almost clear profit. On the other hand, petroleum moves in tank cars for which there is no return loading and on which in consequence there is approximately a 100 per cent empty return haul (R. 987, 999-1000, 2217, 2294, 2301).

The exemption of blackstrap molasses is equally convincing that the Commission's orders against these appellants were not aimed at the removal of discrimination from a transportation viewpoint. Prior to the *Blackstrap cases* the Texas lines had, in purported compliance with the Commission's suggestion in the instant case, reduced the rates on that commodity, both domestic and import, from the Texas ports to the interior, thereby destroying the rate parity which had theretofore existed with New Orleans. The issue in the proceedings before the Commission was whether the New Orleans carriers should be allowed to restore that parity by making similar reductions. Two different divisions of the Commission answered that question in the affirmative. No finding of any difference in transportation conditions from the instant case is made. In the domestic case, 171 I. C. C. 583, the decision seems to rest, in the

last analysis, on the improbability that the Texas producers would take advantage of the difference in rates (l.c. 589); and in the import case, 171 I. C. C. 591, on the improbability that they could take such advantage because of the limited facilities at the Texas ports (l.c. 599). The cases are of particular importance because they were decided by two different divisions of the Commission, with only one dissent, and because in the domestic case there was not involved water-borne traffic passing through the ports—an additional consideration which must be taken into account in a case such as that at bar.

It is submitted that the orders in controversy herein were not aimed at the removal of transportation discrimination, but, like the order set aside in *Anchor Coal Co.* v. *United States*, 25 Fed (2d) 462, at a regulation of commercial or economic conditions. They are therefore arbitrary, unreasonable, and beyond the Commission's power under the doctrine of numerous cases discussed at pages 181 *et seq.* of the original brief of the Texas & Pacific.

VI

The refusal of the Commission to give consideration to the competitive nature of the traffic herein involved and to all the circumstances and conditions attendant thereon, including the water rates beyond the ports, is contrary to the requirements of the law.

There constantly recurs the fact that the traffic herein involved neither originates nor terminates at the ports but merely passes through them. It is of particular importance in connection with the present proposition because the ocean rates are, with unimportant exceptions, the same to and from all gulf ports (R. 3387; 128 I. C. C. 365), although the distances from New Orleans to foreign and coastwise points are generally less than the distances from Galveston (R. 736-37). An actual, compelling competitive condition is thus created. These appellants are deprived almost altogether of the opportunity to participate in the foreign and coastwise commerce moving through the gulf to and from the interior unless they preserve aggregate rail-and-water rates via the Louisiana ports as low as those via the Texas ports. And this they can do only by equalizing the rail rates to and from the former ports with those to and from the latter.[1]

1 The testimony was that rate differentials in favor of one or more gulf ports would not result in lower steamship rates from or to the ports against which the differentials were established, at least not to the extent of the rail differentials (R. 3387-8; 128 I. C. C. 365).

The Commission, however, in effect ruled that this situation could not be taken into consideration. We have seen that in its 1927 report it deleted that portion of the Examiner's proposed report wherein reference was made to the *Import Rate Case, Texas & Pacific R. Co.* v. *Interstate Commerce Commission*, 162 U. S. 197, and substituted therefor a passage in the course of which it observed that the contention that the water-borne character of the traffic ought to be taken into consideration had been found by one of its divisions in a prior case "to be without merit."

The contention, however, can not be thus naively met. In the *Import Rate case* the Commission had found that there was no justification for lower rates on import than on domestic traffic. Overruling the railway's contention that the rates from foreign ports to California were controlled by water or water-and-rail lines, and that it had to charge the low rates complained of in order to share in the movement, the Commission had declared that such circumstances were not within its province and could not be considered under the act. This Court held that in so construing the act and in excluding the considerations urged by the railway the Commission erred. The opinion is very explicit that in considering an alleged discrimination "the attention of the Commission is not to be confined to the advantage of shippers and merchants who deal at or near the ports of the

United States, in articles of domestic production," but that the legitimate interests of the carriers and of "the great body of the citizens * * * who constitute the consumers and recipients of the merchandise carried" (163 U. S. 218), should be considered.

The *Import Rate case* is indistinguishable on principle from the case at bar. In the former the appellant found it necessary to maintain low rates from New Orleans if it was to participate, in competition with water and water-and-rail routes, in the movement of import traffic. If, as the court held, this constituted a dissimilarity of circumstances so that there was no discrimination, under section 2, against shippers of domestic traffic over the same route, it is difficult to see how meeting the same character of competition in the case at bar can constitute a discrimination, under section 3, against the port interests at Galveston. If the Commission erred in the *Import Rate case* in confining its attention to the advantage of shippers and merchants who deal at or near the ports in articles of domestic production, it erred herein even more in confining its attention to the advantage of port interests which merely levy toll on the traffic as it passes through their hands.

There is abundant authority to the effect that "all competition, provided it possesses the attributes of producing a substantial and material effect upon traffic and rate making" (*Louisville & N. R. R. Co.* v. *Behlmer*,

175 U. S. 648, 670-1), must be taken into consideration in determining discrimination. Numerous cases are discussed under the sixth proposition in the original brief of the Texas & Pacific; to them may be added *Export and Import Rates*, 169 I. C. C. 13, *supra*. In that case, carriers participating in rail and water routes on foreign commerce through the south Atlantic and gulf ports were at a disadvantage as compared with carriers participating in rail and water routes via the north Atlantic ports. This disadvantage necessitated an equalization, and in many instances more than an equalization, of the rail rates to and from the ports if the southern and southwestern carriers were to participate in the business. The Commission found that this competition constituted a "special case" within the meaning of section 4, and authorized a departure from that section. In other words, it found that this competition justified the discrimination which arose from a violation of the long-and-short-haul clause. But section 4 is merely a specific application of the general rule of section 3, and it is fair to ask how the same competition can constitute a "special case" justifying a discrimination under the former and yet not constitute a special circumstance justifying a discrimination under the latter. And the further and more comprehensive question also occurs: how can the same character of competition justify a discrimination under section 2 (*Import Rate case*) and under section

4 (*Export and Import Rates*) and not justify a discrimination under section 3, which is *in pari materia* with the other two?

The orders in controversy insure, or at least promote, monopoly, rather than preserve competition. Of a similar construction of the statute this Court said in *Skinner & Eddy Corp.* v. *United States*, 249 U. S. 557, 567-8, "Only compelling language could cause us to impute to Congress the intention to produce results so absurb." That Congress did not intend such results is abundantly apparent from the committee reports heretofore discussed. It will be recalled that the Senate Select Committee observed that: "In the practical management of a railroad * * * it is found impossible to avoid the exercise of discrimination, and, in consequence, the courts have always recognized the distinction between justifiable and unjust discrimination." (Sen. Rep. 46, Part 1, page 183; 49th Congress, First Session). And Senator Cullom reported that: "The committee found * * * that there were cases in which the railroads were compelled to make lower rates for longer than for shorter distances *by the great law of competition, which is stronger than any law we can make* * * *" (Cong. Rec. Vol. 17, Part 4, page 3472; emphasis supplied). There also comes to mind the cogent reasoning of Commissioner Woodlock in his dissent in *Duluth Chamber of Commerce* v. *Chicago & N. W. Ry. Co.*, 156 I. C. C. 156, 171:

> "It is of the nature of competition that it tends to produce inequalities in results. Congress was perfectly well aware of that fact when, after prolonged and mature deliberation, it chose a competitive rather than a noncompetitive principle for the conduct of the railroads. Because of this choice that which would be inadmissible under a noncompetitive system of railroads becomes a necessary element under a competitive system. That is the reason why the existence of competition is and should be an adequate defense under section 3 to the extent that it is shown to exist."

(b) In determining discrimination one of the considerations which must be taken into account, under the *Import Rate case*, is the interest of the public who constitute the producers and consumers of the freight. But these—the shippers—seem, as Commissioner Hall pointed out, to have been lost from sight. In its anxiety to remove a supposed discrimination against the port interests arising from a rate parity, the Commission created discriminations against the real shippers in the form of pronounced rate disparities at interior points.

Sparks and Anadarko, Oklahoma, are a representative example. They are 725 and 719 miles, respectively, from New Orleans. But Sparks is 529 miles from Galveston and Anadarko only 497 miles. On cottonseed cake and meal the single-line rates prescribed by the Commission (98 I. C. C. 265) from Sparks and Anadarko to Galveston are 35 and 34 cents, respectively.

Now Sparks is east of the differential line, and hence the carriers may make the New Orleans rate the same as the Galveston rate, 35 cents. But being west of that line Anadarko is subject to the 5-cent differential prescribed by the Commission herein. Hence a shipper at Anadarko, although 6 miles nearer New Orleans than his competitor at Sparks, must pay 4 cents more than the latter in shipping through that port.

This matter is more fully discussed at pages 220-23 of the original brief of the Texas & Pacific.

VII

In respect of undue preference of the Louisiana ports and undue prejudice of the Texas ports, and in many other respects, the Commission's findings are either unsupported by the evidence or contrary to uncontradicted evidence, and hence its action in making such findings was arbitrary and capricious and its orders based thereon are void.

(a) Even if every other contention herein were resolved against appellants, there would still remain the question whether the Commission's primary findings are supported by the evidence and whether the primary findings support its ultimate finding of undue preference and prejudice. The latter can not be true unless the primary findings make out damage to the Texas

ports— *i. e.*, show that New Orleans has gained an undue advantage and the Texas ports have suffered an undue handicap because of the rate adjustment in controversy. Appellants contend that the Commission's findings taken at their face value do not make such a showing.

We must start consideration of this question with the fact that New Orleans is much older than any of the Texas ports, having been well established at a time when Galveston was still a "wind-swept wilderness" (R. 1737). Since 1901 the port and harbor facilities at New Orleans have been operated under unified public control and under a policy of equal facilities to all; whereas the facilities at the Texas ports are, with some exceptions, privately owned and operated (R. 3485). These factors, considered together with certain natural advantages of location which New Orleans enjoys, would obviate any presumption of transportation discrimination even if New Orleans had far outstripped the Texas ports in development.

This, however, is not the fact. What do the Commission's findings reveal?—

Import Traffic:

> Since 1918 import traffic has increased more rapidly through the Texas ports than through New Orleans. In 1919 the imports through New Orleans

totaled 2,911,798 tons, and through the Texas ports 2,121,528 tons. In 1924 these figures had increased to 4,654,467 and 4,435,127, respectively; an increase of 60 per cent through New Orleans and 109 per cent through the Texas ports.

In the 5-year period 1920 to 1924, inclusive, imports through the Texas ports amounted to 24,000,000 tons and through New Orleans to 22,000,000 tons. Using 1912 as a base, Galveston made much greater progress in import traffic than the other gulf ports (R. 3380-82).

Export Traffic:

Exports through New Orleans amounted in 1919 to 4,232,916 tons, and in 1924 to 4,225,960. The figures for the Texas ports were 6,935,070 and 7,082,229 (R. 3380-81).

Coastwise Traffic:

During the period from 1919 to 1924, inclusive, coastwise receipts and shipments combined increased 22 per cent through New Orleans and 43 per cent through the Texas ports, the total number of tons handled in 1924 being 2,520,435 via New Orleans and 18,390,589 via the Texas ports (R. 3380-81).

Total Tonnage:

The total of foreign and coastwise traffic for New Orleans was 9,202,773 tons in 1919 and 11,400,862 in 1924, an increase of 24 per cent. The total figures for the Texas ports were 21,901,331 in 1919, and 29,917,954 in 1924, an increase of 36 per cent (R. 3380).

Confronted with these figures, showing as they do the greater growth and the stronger position of the Texas ports than of New Orleans, the Commission was driven to pointing out that the New Orleans figures do not include the other Louisiana ports. It admitted, however, that the only substantial traffic through them is petroluem and petroleum products (R. 3374), which it exempted from the findings, and which, therefore, may be laid to one side. While apparently considering, however, that the Louisiana ports must be viewed as a group, it was at pains to segregate the Texas tonnage and to point out that in respect of percentage increase in export and coastwise traffic and in general tonnage Galveston has fallen behind New Orleans since 1912. And at the same time it apparently failed to ascribe any significance to the meteoric career of the port of Houston, as attested by an increase in tonnage from 714,621 in 1920 to 5,343,598 in 1924 (R. 3434). Indeed, the Commission's reports are strangely silent upon the development of Houston as a deep-water port. The record shows, however, that Houston, which is located 48 miles north of Galveston (R. 3348), "furnishes a noteworthy example of a successful port at an inland point originally inaccessible to ocean vessels" (R. 1236). The conclusion is inescapable that Galveston's failure to keep pace with New Orleans in percentage of gain (upon which the Commission seems to have grounded the finding of damage

to the Texas ports) is attributable to the rapid growth of traffic through Houston and other Texas ports.

There can be no doubt that Commissioner Hall correctly stated the situation when he said: "* * * there is no persuasive showing that the Texas ports have had a less healthy development of traffic than New Orleans, for example. Considered as a whole they have gained far more than New Orleans both in percentage and in total tonnage. Galveston has gained less than Houston, but both make common cause against their Louisiana rival" (R. 3431). The contention of complainants that the establishment of differentials is essential to the continued existence of Galveston as a port is quite unsupported by, and indeed is contrary to, the figures discussed above. It is also directly contrary to the evidence of the chief traffic officer of the Texas & Pacific, who pointed out that even under equalization of the rates to New Orleans there has been a steady shrinkage in the movement of certain important commodities thereto from points on the Texas & Pacific (Exhibits A-33, A-34, A-37, and A-38; R. 956-60, 960-62). These and related matters are more fully discussed at pages 156-176 of the original brief of the Texas & Pacific.

(b) On pages 350 and 351 of its 1929 report the Commission mentions the contention of the Texas lines that by the manner in which the New Orleans carriers complied with the 1927 order the latter have "imperiled the

rates on all Texas lines," and after some discussion refers to the "seeming impossibility of maintaining a reasonable and non-prejudicial rate structure" so long as the New Orleans carriers are exempted from the finding of undue preference and prejudice. This matter is discussed at pages 192 to 194 of the original brief of the Texas & Pacific. It need be repeated only that prior to the presentation of this case below the New Orleans carriers published rates which cured the maladjustment that had adventitiously come about (R. 3297); and that in so far as the difficulties arose out of the long-and-short-haul clause of the fourth section, they could and properly should be removed by a grant of authority under *Export and Import Rates, supra.* Under the considered principle announced in that case the New Orleans carriers are entitled to fourth-section relief to enable them to apply at non-competitive points rates higher than the equalized rates applied at points competitive with the Texas carriers.

It may be observed also that prior to the time the Commission, at the instance of the port interests at Galveston, disrupted the rate structure by the orders here in controversy, such equalization as existed had been maintained for years to the apparent satisfaction of the real parties at interest, the producers and consumers of freight in the interior—who, indeed, are not now complaining.

(c) This brief aims, however ineffectually, at brevity. These appellants therefore merely reiterate, without repeating, their contentions: (1) that the rate structure which the Commission condemned is in consonance with rather than violative of section 500 of the Transportation Act, 1920, and section 8 of the Merchant Marine Act, 1920, and that in holding the contrary the Commission placed an erroneous interpretation on these sections (discussed at pages 253 *et seq.* of the original brief of the Texas & Pacific); (2) that the orders in controversy are repugnant to the port-preference clause of section 9 of Article 1 of the Constitution (discussed in the brief of the Board of Commissioners of the Port of New Orleans); (3) that the lower court erred in accepting as binding the facts set out in the reports of the Commission (discussed at pages 256 *et seq.* of the original brief of the Texas & Pacific).

VIII

The voluntary maintenance by these appellants of a rate on coffee from New Orleans to Dallas and Fort Worth lower than is contemporaneously in effect from New Orleans to Waco, Texas, as a matter of law does not result in undue prejudice to Waco or undue preference of either Dallas or Fort Worth.

The complaint in No. 20685 stemmed from the differential rate adjustment effected by the Commission's

1927 order in No. 12798. Prior to the effective date of that order group rates of 55 cents and 48.5 cents applied on green coffee from New Orleans and Galveston, respectively, to Dallas, Fort Worth, Waco, Austin, and San Antonio. Waco, however, is not on the lines of the carriers (these appellants) exempted from the 1927 order and it therefore became subject to the 9-cent differential prescribed therein, on green coffee, as between Galveston and New Orleans. The rate from New Orleans to Waco thus became 57.5 cents, while the excepted carriers established the equalized rate of 48.5 cents from New Orleans to Dallas and Fort Worth. Under the Commission's order the carriers operating between Waco and New Orleans (such as the Southern Pacific) must carry the 57.5-cent rate to the latter point so long as the lines operating from Galveston and Houston maintain the 48.5-cent rate therefrom to Waco. The New Orleans-Waco carriers also, absent fourth-section relief, maintain the 57.5-cent rate to Dallas and Fort Worth.

Here the issue is not between the ports, but between Waco on the one side and Fort Worth and Dallas on the other. But no finding of preference or prejudice can be made, because the Texas & Pacific controls the Dallas-Fort Worth rate and the New Orleans-Waco lines control the rate between those points. If these appellants withdrew from the New Orleans-Waco rate the situation would not be changed because the 57.5-cent rate

would be effective quite the same via other routes. The case falls within the familiar principle that a carrier does not create preference or prejudice by establishing, or participating in, a rate which is already maintained by another and independent transportation agency. *Cf.* also *Phila. & Reading Ry. Co.* v. *United States*, 240 U. S. 334, which is fully abstracted at pages 226-28 of the original brief of the Texas & Pacific.

IX

The orders in controversy contravene the due process clause of the Fifth Amendment to the Constitution of the United States.

It is settled that the due process clause protects the right to use as well as to acquire, hold, and dispose of property. *Buchanan* v. *Warley*, 245 U. S. 60, *Terrace* v. *Thompson*, 263 U. S. 197, *Washington* v. *Roberge*, 278 U. S. 116. And the fact that a common carrier may from its entire business earn a fair return does not justify an invasion of its property rights in some particular respect. *Northern Pacific Ry.* v. *North Dakota*, 236 U. S. 585. The public "may not select any class of traffic for arbitrary control and regulation," *Banton* v. *Belt Line Ry. Corp.*, 268 U. S. 413, 421.

It follows that the orders in controversy contravene the due process clause of the Fifth Amendment. The

territory as to which the Commission has given the Texas ports and the Texas carriers a rate advantage includes practically all the line of the Texas & Pacific in Texas and much of the line of the Louisiana & Arkansas. It includes all the large shipping centers in Texas. The Texas & Pacific has forty junction points with the lines serving the Texas ports, and these junctions serve a population, according to the 1920 census, of 471,410, as compared with a total population of 40,297 at all other open stations in the same territory (R. 963). That foreign and coastwise traffic moving to and from this area via the Gulf of Mexico is being and will be almost altogether lost by these appellants and that they are being and will be deprived of the use of their property to that extent, is obvious. The gross revenue of the Texas & Pacific on such traffic moving through New Orleans has approximated a half-million dollars annually.

This Court has had occasion to note that commerce may be expected "to move along the line of least resistance," *Interstate Com. Com.* v. *Louisville etc. R. R.*, 190 U. S. 273, 283. The avowed object of the complaint before the Commission and of the Commission's orders was to divert from these appellants to their competitors serving Texas ports, foreign and coastwise traffic moving via the Gulf of Mexico. Testimony of traffic officers of the Texas & Pacific that the orders will have

this effect is undisputed. The Commission itself found (R. 3388; 128 I. C. C. 366):

> "The testimony leaves little doubt that the differentials prescribed in the original report, or even smaller differentials on most of the commodities, would in time divert to the Texas ports a substantial portion of most of the commodities having origin or destination in the affected territory that are now moving through New Orleans."

It is submitted that the Commission is not empowered, and could not constitutionally be empowered, so to deprive these appellants of the full and fair use of their property.

Conclusion

The questions of law in this case present certain elements of novelty, but the controlling principles and the factual situation are not new. The rate equalization of ports is as old as the nation's railroads. It existed when Congress first undertook the regulation of railroads, and the proceedings at that time are persuasive that it was intended to be preserved rather than destroyed. Not for more than three decades was it conceived that the right of voluntary equalization did not exist; and—strangest of all—when that right was condemned it was at the behest of interests never intended to be protected by the act to regulate commerce.

Port equalization is an exercise of the right to compete. Wisely or unwisely, that right, subject only to certain definite limitations, is the philosophy of our transportation law. The exercise sought by these appellants is within those limitations, and in forbidding it the Commission substituted its wisdom for that of Congress. This it may not do.

The orders in controversy overstep the intent of Congress, transcend the Commission's powers, and violate the Constitution of the United States. They should be set aside and enjoined in accordance with the prayer of the petitions, which is hereby brought forward and renewed.

Respectfully submitted,

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September 16, 1932.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1932.

THE TEXAS AND PACIFIC RAILWAY COMPANY, LOUISIANA & ARKANSAS RAILWAY COMPANY, et al.,
Appellants,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, et al.,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, GALVESTON DIVISION.

BRIEF ON REARGUMENT FOR NEW ORLEANS JOINT TRAFFIC BUREAU, BOARD OF TRADE OF KANSAS CITY, MO., GRAIN DEALERS ASSOCIATION OF OKLAHOMA, OKLAHOMA MILLERS ASSOCIATION, THE ST. JOSEPH GRAIN EXCHANGE, OMAHA GRAIN EXCHANGE, ATCHISON BOARD OF TRADE, TERRELL CHAMBER OF COMMERCE, AND MONROE TRAFFIC BUREAU, APPELLANTS.

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September 19, 1932.

BARNARD & MILLER PRINT, CHICAGO

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1932.

No. 1.

THE TEXAS AND PACIFIC RAILWAY COMPANY, LOUISIANA & ARKANSAS RAILWAY COMPANY, et al.,
Appellants,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, et al.,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, GALVESTON DIVISION.

BRIEF ON REARGUMENT FOR NEW ORLEANS JOINT TRAFFIC BUREAU, BOARD OF TRADE OF KANSAS CITY, MO., GRAIN DEALERS ASSOCIATION OF OKLAHOMA, OKLAHOMA MILLERS ASSOCIATION, THE ST. JOSEPH GRAIN EXCHANGE, OMAHA GRAIN EXCHANGE, ATCHISON BOARD OF TRADE, TERRELL CHAMBER OF COMMERCE, AND MONROE TRAFFIC BUREAU, APPELLANTS.

STATEMENT.

This case was argued and submitted on October 12 and 13, 1931. By order of this court of May 31, 1932, this cause was restored to the docket for reargument upon all questions involved and attention of counsel was invited to the question "whether the respective relations of the Louisiana ports and the Texas ports to the export, import, and coastwise traffic affected, and to the rates condemned, by the orders in controversy are such that the Louisiana ports may be regarded as localities unduly or unreasonably preferred by such rates within the sense and meaning of Sections 3 (1) and 15 (1) of the Interstate Commerce Act and that the Texas ports may be regarded as localities unduly or unreasonably prejudiced by such rates within the sense and meaning of the same sections."

In our brief of September 12, 1931, we set forth the reasons why the decree of the District Court should be reversed and the orders of the Commission complained of should be permanently enjoined and set aside. In this brief we shall only summarize the points made in the former brief and discuss the question to which counsels' attention was invited by this court in its order of May 31, 1932.

SUMMARY OF POINTS AND AUTHORITIES.

In this brief we present again the same points and authorities as were contained in our original brief at pages 16 to 24, inclusive, and in addition the following point:

VI.

The respective relations of the Louisiana ports and the Texas ports to the export, import, and coast-wise traffic affected, in and to the rates condemned by the order in controversy, are not such that the Louisiana ports may be regarded as localities unduly or unreasonably preferred by such rates within the sense and meaning of Sections 3 (1) and 15 (1) of the Interstate Commerce Act, and the Texas ports may not be regarded as localities unduly or unreasonably prejudiced by such rates within the sense and meaning of the same sections.

Duplex Printing Press Co. v. *Deering*, 254 U. S. 443, 474; 65 L. Ed. 349, 360.

New York Indians v. *United States*, 170 U. S. 1, 32; 42 L. Ed. 927-938.

Arizona v. *California*, 283 U. S. 423, 454, 75 L. Ed. 1154, 1165.

Atlantic Cleaners and Dyers, Inc. v. *U. S.*, 76 L. Ed. Adv. Ops., 795.

Export and Import Rates, Fourth Section Application 2040, 169 I. C. C. 13.

Oklahoma Corporation Commission v. *A. & S. Ry. Co.*, 98 I. C. C. 183.

ARGUMENT.

I.

The order of the Commission will be enjoined and set aside: (a) if the action of the Commission, while in form within its delegated power, is exercised in such an arbitrary and unreasonable manner as to transcend the legitimate bounds of its authority, (b) if the action of the Commission is based on an erroneous construction of the statute, (c) if the order of the Commission is not supported by evidence which shows a violation of the law by the carrier sought to be found guilty, and (d) if the order of the Commission is not supported by appropriate findings of ultimate facts which show a violation of the law.

In our former brief (pages 25 to 27, inclusive) we cited decisions of this court defining the power of the courts in cases where an order of the Commission is sought to be enjoined, particularly calling attention to *Interstate Commerce Commission* v. *Illinois Central Railroad Co.*, 215 U. S. 452, 470; 54 L. Ed. 280, 287; and *Interstate Commerce Commission* v. *Union Pacific R. R. Co.*, 222 U. S. 541, 547; 56 L. Ed. 308, 311.

If we are correct in our contention as to the basis, scope and effect of the orders of the Commission here sought to be enjoined, it is clear that there is authority in the courts to set aside in their entirety the orders of the Commission for the reasons set forth under headings II, III and IV. The argument under heading V is directed to a demonstra-

tion of the invalidity of the 1929 order which specifically condemned port equalization as practiced by the Louisiana port lines from and to points on their own rails. The purpose of the argument under Heading VI is to present our view of the law on the question presented by the court in its order of May 31, 1932, inviting the attention of counsel to the question whether the respective relations of the Louisiana ports and the Texas ports to the export, import and coastwise traffic affected, in and to the rates condemned by the order in controversy are such that the Louisiana ports may be regarded as localities unduly or unreasonably preferred by such rates within the sense and meaning of Section 3 (1) and Section 15 (1) of the Interstate Commerce Act, and whether the Texas ports may be regarded as localities unduly or unreasonably prejudiced within the sense and meaning of the same sections.

II.

In entering both its 1927 and 1929 orders, the Commission acted arbitrarily and in a manner to transcend the legitimate bounds of its authority in that its orders, while in form directed to regulation of freight rates, in reality are directed (1) to the establishment of an arbitrary rate structure for the purpose of overcoming the assumed commercial and economic advantages of the Louisiana ports, and (2) to the diversion of tonnage from one through rail-and-ocean route to another through rail-and-ocean route. Such orders are arbitrary, exceed the statutory power of the Commission and therefore are void.

In our original brief (pages 28 to 36, inclusive) we set forth quotations from the Commission's decision as proof that the orders of the Commission complained of, while in form directed to the regulation of freight rates, were in substance designed for the particular and primary purpose of off-setting assumed commercial and economic advantages at New Orleans, of placing an arbitrary barrier in the way of foreign commerce which might seek an outlet to the sea via that port, and of specifically giving to Galveston advantages in rates for the purpose of increasing the flow of traffic through the port of Galveston.

We pointed out in our original brief that the purpose of the complaint was to secure additional business for the Texas ports; that the Commission recognized that would be the effect of granting the prayer of the complaint; that the Commission ascertained and recited the advantages which New Orleans enjoyed in a commercial way; that the Commission assumed the power to consider the differences in commercial conditions affecting the two ports, and that the

adjustment which was prescribed by the Commission was based on commercial rather than transportation conditions and was designed to divert traffic from New Orleans to the Texas ports.

When the complaint to the Commission and the testimony in support of it is examined, it is found that the subject complained of was not the intrinsic unreasonableness of the rates which were charged by the carriers serving the Texas ports and by the carriers serving the Louisiana ports. The complaint rather was as to the injury which the Texas ports felt was sustained by them because of the superior advantages which the Louisiana ports enjoyed.

The injury complained of was one, as the testimony clearly indicates, received from circumstances extrinsic to the matter of transportation charges; originally there was a complaint in form that the rates to and from Galveston were unjust and unreasonable, but that contention was specifically abandoned. (Rec., 3348.) Moreover, it is specifically found by the Commission that the rates to and from New Orleans were not unreasonably low so as to throw a burden on other traffic. (Rec., 3353.) While it may be true that the opinion of the Commission may contain some sentences which, when segregated, may give some support to the contention that the order was based upon a consideration of transportation conditions surrounding the adjustment of rates which was condemned, we think, when the opinion is considered as a whole in the light of the condition of the record to which we have referred, it clearly results that the order of the Commission was based upon the belief by the Commission that it had the right, under the law, to protect the interests at the port of Galveston and other Texas ports from the consequences of competition by port interests at New Orleans and competition of the carriers serving that port upon the same rates as were in effect over

the lines of the carriers serving Galveston by requiring the Louisiana carriers to charge higher rates than were in effect to and from the Texas ports. The Commission, in exercising this power, had no right to lessen the volume of business of one port on account of industrial conditions and to increase the volume of business at a competing port by establishing a differential in freight rates between that community and others which compete with it. Stated differently, the orders sought to be restrained were made in consequence of an assumption by the Commission that it possessed the extreme power to prohibit competition on equal terms between the carriers serving the Louisiana ports and the carriers serving the Texas ports, and on the assumpiton that it had the power to adjust rates so as to equalize commercial and industrial conditions. Under such circumstances it is clear that the Commission acted arbitrarily and in a manner to transcend the legitimate bounds of its authority; the orders entered are consequently void and should be enjoined. The authorities which support such a conclusion, which include

I. C. C. v. *Diffenbaugh*, 222 U. S. 42, 56 L. Ed. 83.

Ellis v. *I. C. C.*, 237 U. S. 434, 445, 59 L. Ed. 1036, 1041.

Southern Pacific Co. v. *I. C. C.*, 219 U. S. 433, 55 L. Ed. 283.

Anchor Coal Co. v. *U. S.*, 25 Fed. (2d) 462.

A. T. & S. F. Ry. Co. v. *I. C. C.*, 190 Fed. 591.

are discussed on pages 37 to 43 of our original brief.

III.

In entering both its 1927 and 1929 orders, the Commission acted arbitrarily, and without regard to its statutory duty, in that it failed to give consideration to the fact that competition of competing through rail-and-ocean routes, via which an equality of charges and conditions prevailed, justified the equalization of the inland rail rate factors.

Argument in support of this proposition is contained in our original brief at pages 44 to 55, inclusive.

As indicating that the Commission failed to give consideration to the fact that competition of competing through rail-and-ocean routes, via which an equality of conditions and charges prevailed, justified the equalization of the inland rail rate factors, we direct the attention of the Court to the fact that in the proposed report by Examiner Koch on further hearing, filed October 4, 1926, he had discussed the right of the carrier to meet legitimate competition by reducing its rates, and that the Commission in its decision eliminated this statement of the Examiner as to the right of the carrier to meet competition and substituted therefor new paragraphs which flouted or ignored a decision of this Court. Examiner Koch, in the proposed report referred to, (Rec., 3467-3503) in discussing the contention of the Texas & Pacific that an equality of rates cannot be unduly prejudicial, said (Rec., 3503):

> "This carrier contends that an equality in rates such as that here complained of cannot be unduly prejudicial. The cases which it cites do not support this view of the law. It is a familiar legal principle that each community is entitled to the benefits arising from its natural advantages, and that neither the commission nor the carriers may lawfully adjust rates for the purpose of equalizing natural advantages. Alongside that

principle is another one, namely, that a carrier may meet competition so long as it is not guilty of undue prejudice and so long as it does not charge rates which are so low as to burden other traffic. Many cases are referred to by this carrier to show that the courts and the commission have generally construed the statute which the commission administers to encourage and promote competition and not to hamper or destroy it, as it is contended would be the effect of the establishment of differentials. The fact that the law declares unlawful only discrimination that is unjust and prejudice that is undue indicates that carriers were intended to be given some latitude in fixing rates and that distance or cost of service need not be the sole criterion by which rates shall be measured. In order to meet legitimate competition, therefore, a carrier may reduce its rates so as to have the effect of equalizing to some extent the natural advantages of competitive interests, but there is a limit under the law beyond which the carrier may not go in equalizing those advantages. In determining whether carriers participating in the equalized rates to both ports have not gone beyond that limit with respect to the commodities here considered, the commission must consider all circumstances and conditions of record which reasonable men would regard as affecting the welfare of the ports, the shippers and exporters, the carriers, and the producing and consuming public. *Texas & P. Ry. Co.* v. *Interstate Commerce Commission*, 162 U. S. 197."

The report of the Commission of June 29, 1927 (Rec., 3367) deleted the above quotation from the proposed report of the Examiner, with the exception of the first three sentences, and substituted therefor the following (Rec., 3404):

"This carrier contends that an equality in rates such as that here complained of can not be unduly prejudicial. The cases which it cites do not support this view of the law. It is a familiar principle that each community is entitled to the benefits arising from its natural advantages. But another principle, equally well settled, is that a carrier may meet competition so long as it is not guilty of undue prejudice, does not

charge rates which are so low as to burden other traffic, and does not contravene the declared policy of Congress to foster and preserve in full vigor both rail and water transportation. Many cases are cited by this carrier to show that the courts and the commission have generally construed the statute which we administer as designed to encourage and promote competition and not to hamper or destroy it, as it is contended would be the effect of the establishment of differentials. The fact that the law declares unlawful only discrimination that is unjust and only prejudice that is undue indicates that it was the intent to give the carriers some latitude in fixing rates, and that distance or cost of service need not be the sole criterion by which rates shall be measured. But, as indicated above, there are limits beyond which a carrier may not go, even in meeting competition.

The essential questions which we must here determine are these: (1) Whether there is a disregard of cost of service to the ports which results in giving New Orleans for the same charge service which costs materially more than the service to the Texas ports; (2) if so, whether this disregard of cost of service is a preference of New Orleans over the Texas ports in the sense that the same carriers are responsible for the rates in both cases; and (3) if so, whether this preference is undue, that is to say, whether it causes advantage to New Orleans to the substantial injury of the Texas ports. The Texas & Pacific contends that it is in no way responsible for the rates to the Texas ports, which it does not reach, and also that the parity of rates which it maintains to New Orleans does not involve material disregard of cost of service, or result in injury to the Texas ports.

The Texas & Pacific insists that since this traffic neither originates at nor is destined to any of the ports, the rail rates which we are here considering are in essence proportional rates, constituting merely factors of the aggregate through rates between the interior points and the foreign or coastwise destinations beyond, and that in determining the matter of port equalization consideration should be given, not only to the rail factors, but also to the water factors which enter into these aggregates. In *Tobacco from Ohio River Crossings*, 73

I. C. C. 384, division 2 found a similar contention to be without merit. Equalization of port rates on the basis advocated by this carrier would require consideration, in every instance of port relationship, of water rates not on file with us and over which, except on coastwise traffic under certain circumstances, we have no jurisdiction. This does not mean, however, that the fact that a port is not the origin or destination of the traffic passing through it is not entitled to consideration in countenancing greater disregard of distance in import, export, or coastwise rates than in corresponding domestic rates."

A fair summary of the difference between the above-quoted portions of the proposed report and the Commission's finding is that the Examiner recognized, in part at least, the principle laid down by this Court in *Texas & Pacific Ry. Co.* v. *I. C. C.*, 162 U. S. 197; 40 L. Ed. 940, (hereinafter referred to as the *Import Rate Case*), that competition between carriers justified the establishment by the New Orleans carriers of the same rates as are maintained by rail carriers serving Galveston, so long as such rates are not so low as to burden other traffic, while the Commission not only ignored the principle announced by this Court, but followed a decision of Division 2 in *Tobacco from Ohio River Crossings*, 73 I. C. C. 384, in which a contrary principle was announced.

In that case Division 2 had discussed the principle of port equalization and particularly the contention of protestants and respondents in that case that the rate to a port is not integral but is only one of the factors that go to make up the total cost of transportation from point of origin to final destination, and that equalization of port rates requires consideration not only of the rate to the competing ports, but also the water rates from the ports. The Commission expressly found (pages 386-7):

"We have no jurisdiction or control over ocean rates

to foreign ports, and the equalization of port rates on the basis advocated by protestants would place upon the rail lines the burden of the disabilities of the several ports, arising from such causes as distance from foreign markets, difference in harbor facilities, and other conditions affecting ocean rates. No stabilization of rail rates would be possible under such an adjustment.

The record is convincing that the present export rates from the river cities to New Orleans are depressed by reason of former river competition. We are not convinced that any fixed relationship has ever existed between these rates to Atlantic and Gulf ports, and we do not feel that the equalization of port rates or the restoration of the parity between domestic and export rates are sufficient to justify the proposed increases, but we have many times held that if a carrier elects to discontinue a competitive rate, whether because the competition no longer exists or because it does not care longer to compete, we would concern ourselves only with whether or not the increased rates are just, reasonable, and proper."

It will be observed that in its decision in the instant case in 1927 there is no express negation or refusal of the Commission to follow the principle laid down in the *Import Rate Case* to the effect that the Commission must take into consideration ocean competition and all circumstances and conditions existing beyond the seaboard which could legitimately be regarded as justifying a difference in rates between import and domestic traffic; that among these circumstances and conditions to be considered are "the fair interests of the carrier companies and the welfare of the community which is to receive and consume the commodities." Nevertheless in substance it is clear that the Commission did refuse to follow in the instant case, the principles of law enunciated by this Court in the *Import Rate Case.*

Furthermore as we pointed out in some detail on pages 47 to 55 in our opening brief, the principle announced by

this court in *Import Rate Case* was in full accord with the construction given by the English courts to the similar section contained in the English law, citing:

> *Londonderry Port and Harbour Commissioners* v. *The Great Northern Ry Co. (Ireland) et al.* (1887) 5 Ry. & Can. Traf. Cas. 282.
>
> *Dublin and Manchester Steamship Co.* v. *London and North-Western Ry. Co.* (1912), 15 Ry. & Can. Traf. Cas. 88.

In the case first cited we find this particularly apt statement of Sir Frederick Peel, at page 284:

> "As this application has reference to cross channel traffic, regard must be had to the throughout route, and not merely to one portion of it, for, on the question whether enough is done in the interest of a port of shipment, or of any other point in a route by which such traffic may pass, to attract the traffic that way, as much or more depends upon how matters stand in relation to rates and services upon a view of the whole distance, as upon the manner in which just a portion of the route compares in these respects with some similar portion of another route."

The failure of the Commission to follow the law as laid down by this court in the *Import Rate Case* and by the English Courts in the cases cited demonstrates that the orders entered were arbitrary and void and should be enjoined.

IV.

The 1927 and 1929 orders are not supported by evidence which shows that the equalization of competing ports in respect of export, import and coastwise rates results in preference and prejudice which is undue.

In our original brief (pages 55 to 67, inclusive) we argued that an equalized import, export and coastwise rate structure does not violate Section 3 of the Act so long as (1) the rate to the nearer port is not in excess of a maximum reasonable rate; (2) the equalized rate to the more distant port is not so low as to cast a burden on other traffic; and (3) the equalization is necessary if the carriers serving the more distant port are to compete for the through traffic in respect of which the ports are but junction points between rail and ocean carriers.

The question there discussed is primarily one of law and not of fact. We ask this Court to apply the principle announced in *Philadelphia & Reading Railway Co.* v. *United States*, 240 U. S. 334, 60 L. Ed. 675, where it was held that if the facts reported in a decision of the Commission afford no foundation for the Commission's findings, enforcement of an order based thereon must be enjoined. We have pointed out that, according to the Commission's own findings, the Texas ports, even under the equalized rate structure, had a greater development than at New Orleans, but even though the Texas ports had not enjoyed the phenomenal growth shown by the record and found by the Commission, we insist that the right of the carriers serving New Orleans to compete as a part of a through route for traffic transported between inland points and foreign points is superior to any right on the part of Galveston.

As to the three propositions the existence of which showed

no violation of Section 3 it is important to note that as to the first there was no contention that the rates to and from the Texas ports were unjust or unreasonable. (Rec., 3348.) As to the second proposition the Commission expressly found in the 1925 report that there was no evidence to show that the equalized rates to New Orleans were so low as to cast a burden on other traffic. (Rec., 3353.) As to the third proposition, we find that the carriers rest their claim to equalization on the fact that competition between the rail-and-ocean routes through Galveston and through New Orleans compelled the equalization of the inland factor to New Orleans and to Galveston. Moreover, the Commission found in the 1927 report that the prescription of differentials would in time divert to the route through the Texas ports that traffic which was then free to move over the route via New Orleans under the equalized rates. (Rec., 3388.) The testimony of the chief traffic officer of the Texas & Pacific Railroad was emphatic on the point that without port equalization the Louisiana port lines could not hope to compete with the Texas port lines for import, export and coastwise traffic originating at or destined to interior points in differential territory. (Rec., 901-5, 1002.)

In the *Import Rate Case*, *supra*, this Court found that competition between one ocean-and-rail route and another ocean-and-rail route justified the Texas & Pacific in maintaining differences in rates on import traffic and domestic traffic between the same points. As appears from the Commission's report (4 I. C. C. 447, 466) the rates on import traffic originating at Liverpool for rail transportation from New Orleans to San Francisco were in cents per hundred pounds.

	Import	Domestic
Boots and Shoes	80	$3.70
Dry Goods	80	3.74
Soap	70	1.06

It will be observed that the difference between the import rate and the domestic rate on boots and shoes is $2.90, or to state it in percentages, the domestic rate was 462 per cent of the import rate. Similarly, on dry goods the domestic rate was 467 per cent of the import rate and on soap the domestic rate was 151 per cent of the import rate. This court held that competition between rival routes justified such differences and that undue prejudice and preference did not result therefrom.

If competition between ocean-and-rail carriers between Liverpool and San Francisco justified the Texas & Pacific in participating as a part of the through route, in the maintenance of such great differences in rates, it is difficult to see how the Texas & Pacific can be denied the right to participate as part of the through route via New Orleans between Liverpool and Oklahoma City in competition with a through rail-and-water route from Liverpool to Oklahoma City via Galveston, and charge the same rate for its portion of the haul between New Orleans and Oklahoma City as is charged by the rail carriers between Galveston and Oklahoma City. It has always been the law, as laid down by this Court, and heretofore by the Commission, that competition is a circumstance and condition which justifies differences in rates under Section 3, as well as under Section 4 of the Interstate Commerce Act.

Among the cases which enunciate this principle we cited and analyzed on pages 59 to 61 of our opening brief, the following:

> *I. C. C.* v. *Baltimore & Ohio*, 145 U. S. 263, 276; 36 L. Ed. 699, 703.
>
> *I. C. C.* v. *Alabama M. R. Co.*, 168 U. S. 144, 164; 42 L. Ed. 414, 422, in which this court, following *Denaby Main Colliery Company* v. *Manchester, S. & L. Rw. Co.*, L. R. 11 App. Cas. 97, and *Phipps* v. *London & North Western Railway*, (1892) 2 Q. B. 229, held that a difference in rates induced

by competition between rival routes is not necessarily unduly preferential or prejudicial.

I. C. C. v. Louisville & N. R. Co., 73 Fed. 409.

Louisville & Nashville R. Co. v. Behlmer, 175 U. S. 648, 44 L. Ed. 309.

East Tennessee, Virginia & Georgia R. Co. v. I. C. C., 181 U. S. 1, 45 L. Ed. 719.

Londonderry Port and Harbour Commissioners v. The Great Northern Ry. Co., (Ireland) et al., (1887), 5 Ry. & Can. Traf. Cas. 282.

Dublin and Manchester Steamship Co. v. London and North-Western Ry. Co., (1912), 15 Ry. & Can. Traf. Cas. 88, in which, as here, a port closer to the interior sought, in respect of commerce to move by water beyond the port, a "differential" in the inland rates under a port more distant from the interior. It was held that under the English Statute it was not necessary to establish such a differential in order to escape undue prejudice and preference.

We come now to consider another phase of competition between carriers. We have pointed out in our previous brief that in granting fourth section relief on the same commodities in the same territories as are here involved, the Commission authorized the circuitous carrier operating between Galveston and the interior to charge *the same rate* as the short-line carrier for distances not more than 70 per cent greater than the short-line distance when the latter was less than 500 miles and for distances not in excess of 50 per cent of the short line distances when the latter was in excess of 500 miles and not more than 1,000 miles. The underlying basis for the enactment of Section 4 of the Interstate Commerce Act was to make unlawful a particular form of unjust discrimination or undue preference or prejudice. If there is no unjust discrimination as between the junction point and a local point on the circuitous line when the rate is maintained on a higher basis from the local point

than from the junction point over the line through the local point because of the competition between carriers serving the junction point, it is difficult to see how there can be unjust discrimination when the rate from New Orleans to a destination is the same as from Galveston to the same destination where the longer haul from New Orleans does not exceed 170 per cent of the Galveston distance up to 500 miles and does not exceed 150 per cent of the haul from Galveston between 500 and 1,000 miles.

As illustrating the other extreme effect on this question of shrinkage permitted under the domestic rate we give the following: If the distance to New Orleans from Texas points exceeds that to Galveston by more than 25 per cent, there is a differential in the rate on cottonseed cake and meal to be applied against New Orleans shipments of 5 cents per hundred pounds (Rec., 3417). Taking a point in Texas 500 miles distant from Galveston and 630 miles (which is more than 25 per cent greater) distant from New Orleans, we find the rates prescribed by the Commission in *Oklahoma Corporation Commission* v. *A. & S. Ry. Co.*, *supra*, are 34 cents to Galveston for the 500 miles distance and 37 cents for the 630 miles to New Orleans. Since the Commission, however, in the instant case requires a rate to New Orleans which has a 5-cent differential above the Galveston rate, it results in a rate of 39 cents to New Orleans for the 630 miles, which is 2 cents in excess of the scale rate prescribed by the Commission. In other words, there is not only no shrinkage permitted below the maximum reasonable rate to New Orleans but there is instead a requirement which results in a rate 106 per cent of the maximum reasonable rate.

We point to the difference as between the departures from the maximum reasonable rates permitted in the same territory in fourth section orders, and the departure

from the maximum reasonable rates permitted in the instant proceeding as evidencing the extent to which the Commission acted in an arbitrary manner. If the Commission had given the same effect to competitive influences in this case as it has in the fourth section cases, port equalization could not have been condemned. Instead, however, of paying heed to competitive conditions the Commission in the instant case sought to effectuate an adjustment for the purpose of prohibiting competition and for the purpose of equalizing commercial and economic conditions. In so doing it transcended the bounds of its authority and its order should be enjoined.

Another illustration, and this one involving export and import traffic, is found in *Export and Import Rates*, 169 I. C. C. 13. In that case the Commission authorized the carriers serving the south Atlantic and Gulf ports to maintain lower rates on export and import traffic without complying with the Fourth Section, provided the relief did not apply to the establishment over any route of rates on export and import traffic less than 65 per cent of the rates prescribed or approved by the Commission as maximum reasonable rates for application on like traffic in domestic commerce for the distance over the said route between the port and the interior point involved, nor to the establishment of rates on export and import traffic less than 65 per cent of the rates contemporaneously in effect on like property from or to the highest rated intermediate point, with the further proviso that the earnings on the lowest minimum weight should not be less than 12 cents per car mile when the carload minimum weight on the commodity was less than 40,000 pounds.

In a recent case, *Fourth Section Application No. 13918*, decided August 24, 1932, (unreported), rail carriers serving the south Atlantic and Florida ports and their northern con-

nections, were authorized to establish commodity rates on carload traffic from points in Central and Western Trunk Line territories to said ports without observing the long and short haul provision of Section 4 of the Interstate Commerce Act subject to the same limitations as were applied in the case just referred to.

These cases, and others cited in our original brief, make it clear that the Commission applied in the instant case much more stringent rules than it has applied in other cases and support our contention that the preference and prejudice complained of by Galveston was in no instance undue, that the action of the Commission was arbitrary and therefore there was no violation of Section 3 of the Interstate Commerce Act.

V.

The Louisiana port carriers neither serve with their own rails any of the Texas ports, nor have they any controlling voice in fixing the level of the assailed rates thereto or therefrom; and the maintenance by them of the same rates on shipments of foreign and coastwise traffic from or to interior points on their line to or from the Louisiana ports served by them as are contemporaneously maintained on like traffic from or to the same interior points to or from the Texas ports by competing Texas port carriers, does not, as a matter of law, result in a violation of Section 3 of the Interstate Commerce Act.

The Commission in the 1929 order in this case, in attempting to control the rates of the Louisiana port carriers through the guise of the Section 3 order, alternative in form but not in fact, transcended the legitimate bounds of its authority and therefore the order is void and should be enjoined.

The questions presented by these two propositions relate solely to the validity of the 1929 order and particularly to our contention that the Commission erroneously construed Section 3 of the Act when it held that the Louisiana port carriers are subject to Section 3 of the Act in so far as the relation of rates between points on their own lines and rates maintained by other carriers between other points is concerned.

We discussed the facts and the law on these points at considerable length on pages 68 to 113, inclusive, of our original brief. We there showed that under the construction of Section 3, heretofore adopted by the Commission, under the construction of Section 3 as heretofore announced by this

court and under the construction of a similar section in the English law, as announced by the English courts, no carrier can be held guilty of violating Section 3 of the Act unless it is in control not only of the rate alleged to be preferential, but likewise of the rate alleged to be prejudicial. Stated differently, the principle for which we contend, as first announced by the Commission in *Ashland Fire Brick Co.* v. *S. Ry. Co.*, 22 I. C. C. 115, is that preference and prejudice go hand in hand and must be in control of the same carriers.

Long before this principle was announced by the Commission in the *Ashland Fire Brick Case*, it had had the approval of the English courts as is indicated on pages 77 to 85 of our previous brief where we cited and analyzed *Hozier* v. *Caledonian R. Co.* (1855), 17 Sess. Cas. 302, 1 Ry. & Can. Traf. Cas. 27; *Caterham Railway Company* v. *London, Brighton and South Coast Ry. Co.* (1857), 87 E. C. L. R. 409, 1 C. B. (N. S.) 410; *Foreman* v. *Great Eastern Ry. Co.* (1875), 2 Ry. & Can. Traf. Cas. 202; *Richardson* v. *Midland Railway Co.* (1881), 4 Ry. & Can. Traf. Cas. 1; *Dublin Steam Packet Company* v. *London and North-Western Ry. Co.* (1881), 4 Ry. & Can. Traf. Cas. 10; *Liverpool Corn Traders' Association* v. *Great Western Ry. Co.* (1892), 8 Ry. & Can. Traf. Cas. 114; *Pickering Phipps* v. *London and North-Western Ry. Co.* (1892), 8 Ry. & Can. Traf. Cas. 83; *Plymouth Incorporated Chamber of Commerce* v. *Great Western Ry. Co., et al.* (1895), 9 Ry. & Can. Traf. Cas. 72; *Lever Brothers, Limited* v. *Midland Ry. Co.* (1909), 13 Ry. & Can. Traf. Cas. 301.

In *Lever Brothers, Limited*, v. *Midland Ry. Co.*, (1909), 13 Ry. & Can. Traf. Cas. 301, Vaughan Williams, L. J., stated (page 312):

> "I agree with Lawrence, J., that it is not undue preference for a railway company to serve one of two trad-

> ers in the same line of business on more favourable terms than his rival in trade is served by another railway company."

The *Ashland Fire Brick* doctrine was not modified by the decision of this court in *I. C. C.* v. *Illinois Central*, 215 U. S. 452, 54 L. Ed. 280, as in that case this Court specifically said that nothing therein stated was inconsistent with what had been held by this Court in *Central Railroad Co. of New Jersey* v. *U. S.*, 257 U. S. 247, 66 L. Ed. 217 (hereinafter referred to as the "*Creosoting case*") in which this Court had cited with approval the decision of the Commission in the *Ashland Fire Brick* case.

The legal significance of the facts in the *Creosoting Case* and in this case are so similar as to merit close attention. In the *Creosoting Case*, the Central Railroad of New Jersey and the Pennsylvania Railroad were complained of because they failed to maintain a creosoting-in-transit privilege at Newark, N. J., while contemporaneously joining certain southern and mid-western carriers in joint through rates which were subject to creosoting-in-transit privileges at other points, such as Memphis, Tenn. The Commission found the complaint well founded and issued an order under Section 3 of the Act which was alternative in form, and could be complied with either by the Central of New Jersey and the Pennsylvania establishing the creosoting privilege at Newark, or by the southern and mid-western carriers abolishing creosoting-in-transit privileges on their lines. This Court found that the order was void because while alternative in form it was not alternative in reality, saying (257 U. S. 257-8; 66 L. Ed. 221):

> "Twenty-one of the appellants are powerless either to cause the Central and the Pennsylvania to install the privilege at Newark or to cause the southern and mid-western carriers to discontinue the practice on their lines. The Central and the Pennsylvania are likewise

> powerless to cause these connecting carriers to withdraw the privilege. They can, it is true, equalize conditions by establishing the privilege at Newark. But to do so would involve departure from a policy to which they have steadfastly adhered, and adhesion to which was held by the Commission not to be unreasonable."

The language just quoted, when paraphrased, is susceptible of exact application to the facts in this case. It would then read:

> "The Texas port lines are powerless to cause the Louisiana port lines to increase their rates to and from New Orleans; the Louisiana port lines are likewise powerless to cause the Texas port lines to reduce their rates to and from Galveston. They can, it is true, establish the differentials by such an increase in the rates to and from New Orleans but to do so would involve a departure from a policy to which they have steadfastly adhered and adhesion to which was held by the Commission not to result in rates so unreasonably low as to cast a burden on other traffic."

The Commission in the instant case cites the *Creosoting Case*, taking therefrom the following quotation (160 I. C. C. 345-357):

> "Carriers can be held jointly and severally responsible for unjust discrimination *only* if each carrier has participated in some way in that which causes the unjust discrimination."

In its quotation the Commission omitted the italicized word "only" thus materially changing the emphasis which this Court intended to convey. We do not question the correctness of the principle, but we do contend it does not have that application to the facts of this case which the Commission supposed. We must have some test to determine whether or not a carrier has participated in *that which* causes the undue preference and prejudice. The test which we submit, believing it to be sound, is: Is the carrier, sought to be found guilty, responsible for and in

control of both the prejudicial as well as the preferential rate? If the answer to this question is "No," there exists no such participation in the discrimination as to bring the carrier within the purview of Section 3. It was because the answer to that question had to be "No" in the *Creosoting Case* that this Court there set aside a section 3 order of the Commission, making it exceedingly plain that it was because the preference was controlled by one carrier and the prejudice by another carrier that neither could be found guilty of violating Section 3, this Court saying (italics ours):

> "What Congress sought to prevent by that section (Section 3) as originally enacted, was not differences between localities and transportation rates, facilities, and privileges, but unjust discrimination between them *by the same carrier or carriers.*"

When we come to answer the question so far as the Texas & Pacific is concerned, we find (1) that the direct Dallas-Galveston rate is made by the direct lines, either the Santa Fe or Missouri-Kansas-Texas and that the Texas & Pacific does not join in that rate as applied over the direct route and cannot be charged with any responsibility whatever therefor; (2) the Texas & Pacific does maintain the same rate as the Santa Fe and the Missouri-Kansas-Texas from Dallas to Galveston via Forth Worth, but the measure of the rate is fixed by the Santa Fe and by the Missouri-Kansas-Texas; if the Texas & Pacific should cancel that rate from Dallas via Fort Worth to Galveston, it would not help Galveston as it would substitute a higher rate made up of the combination of the rate from Dallas to Fort Worth and the rate from Fort Worth to Galveston, and that combination would make a higher rate than the direct rate from Dallas to New Orleans; and (3) Arlington is a local point on the Texas & Pacific between Dallas and Fort Worth and the rate from Arlington to Galveston cannot be reduced by the

Texas & Pacific because the direct Galveston lines will not permit that reduction. Furthermore, the Fourth Section would prevent such a reduction since, if made, the rate from Arlington to Galveston would be less than the rate from Fort Worth, an intermediate point. If the Texas & Pacific withdraw from participation in the rate from Arlington to Galveston via either Dallas or Fort Worth, the result will be not to reduce, but to increase the rate from Arlington to Galveston if the Texas & Pacific charges anything whatever for its haul from Arlington to Dallas, or to Fort Worth.

These three situations show a necessity for a real alternative in compliance with the Commission's order. There is no real alternative. The Texas & Pacific cannot force the Texas port lines to reduce their rates to and from Galveston. The Galveston lines are powerless to compel the Texas & Pacific to increase its rates to and from New Orleans.

VI.

The respective relations of the Louisiana ports and the Texas ports to the export, import, and coastwise traffic affected, in and to the rates condemned by the order in controversy, are not such that the Louisiana ports may be regarded as localities unduly or unreasonably preferred by such rates within the sense and meaning of Sections 3 (1) and 15 (1) of the Interstate Commerce Act, and the Texas ports may not be regarded as localities unduly or unreasonably prejudiced by such rates within the sense and meaning of the same sections.

The matter contained in the discussion under this point is directed to the question to which the court invited counsel's attention in its order of May 31, 1932. For reasons discussed below it is the opinion of undersigned counsel that a port is a locality within the sense and meaning of Sections

3 (1) and 15 (1) of the Interstate Commerce Act, so that in a proper case it may complain of a violation of the Interstate Commerce Act. It is our further opinion that under the facts of the instant case the Louisiana ports are not localities which are unduly or unreasonably preferred, nor are the Texas ports localities which are unduly or unreasonably prejudiced within the sense and meaning of the sections mentioned; consequently the question to which our attention is directed is answered in the negative.

The language of Section 3 (1) provides:

> "That it shall be unlawful for any common carrier subject to the provisions of this Act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

The foregoing is identical with the provisions of the English statute in effect on February 4, 1887, the date of the enactment of the provisions quoted, with the exception that the words "or locality" do not appear in the English statute. These words are found only in the Interstate Commerce Act. The provision above quoted has existed unchanged from the date of the original enactment of the Interstate Commerce Act on February 4, 1887.

The provision of Section 15 (1) reads as follows:

> "That whenever, after full hearing, upon a complaint made as provided in section 13 of this Act, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this Act for the trans-

portation of persons or property or for the transmission of messages as defined in the first section of this Act, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this Act, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this Act, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged (or, in the case of a through route where one of the carriers is a water line, the maximum rates, fares, and charges applicable thereto), and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation or transmission other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed."

This means no more than that the Commisison is authorized to make an order removing the violation which it has found to exist so far as Section 3 of the Act is concerned; unless there is, in fact and in law, a violation of that section, the Commission may not make a valid order requiring the establishment of a rate or practice to conform to the Commission's view as to what would be necessary to remove the violation alleged to exist under Section 3.

An examination of the reports and orders of the Commission shows that the complaint was by and for the locality of Galveston as a port of import and export. Unless there

was a violation of Section 3 the Commission was without authority to make the order granting relief to that locality.

The provisions of Section 3 (1) were originally embodied in Senate Bill 1532 of the first session of the Forty-ninth Congress. In the report of the Committee of the Senate having charge of the bill, of which Senator Cullom was chairman, there were enumerated some of the complaints which the people made to the Committee against the railroad companies. In that report we find the following six complaints among fourteen listed (page 102*):

> "The complaints against the railroad system of the United States expressed to the committee are based upon the following charges:
>
> 1. That local rates are unreasonably high, compared with through rates.
>
> 2. That both local and through rates are unreasonably high at non-competing points, either from the absence of competition or in consequence of pooling agreements that restrict its operation.
>
> 3. That rates are established without apparent regard to the actual cost of the service performed, and are based largely on 'what the traffic will bear.'
>
> 4. That unjustifiable discriminations are constantly made between individuals in the rates charged for like service under similar circumstances.
>
> 5. That improper discriminations are made between articles of freight and branches of business of a like character and between different quantities of the same class of freight.
>
> 6. That unreasonable discriminations are made between localities similarly situated."
>
> * * * * * *

In the debates, in commenting on Senate Bill 1532, Senator Cullom on April 14, 1886, said (pages 3 and 4):

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* Pages as to the debates in the Senate and House of Representatives and to committee reports refer to pages of Painter's Compilation published Washington, D. C., 1887. We give also the date on which the statement was made in the Congress.

"The general theory of the measure is that as unjust discrimination in its various forms is recognized as the chief of all evils growing out of the existing methods of railroad management it is the duty of Congress to strike at that evil above all things else. The bill has accordingly been drawn with that end in view. The first section defines and prescribes the scope and application of the bill. The second, third and fourth sections specifically prohibit and declare unlawful the various forms of unjust discrimination between persons, between different commodities or particular kinds of traffic, and between places."

Further, in discussing Section 2, Senator Cullom said at the same time, (pages 5 and 6):

"The second section strikes at the evil of which the most serious complaint is made, and made justly, by prohibiting and declaring unlawful every variety of personal favoritism or unjust discrimination between persons. Its provisions are confined to that one great evil, and the object of the section is to place all shippers upon an absolute equality as to the rates charged for a like service under substantially similar circumstances."

In discussing Section 3, Senator Cullom said (page 6):

"The third section is broader and more general in its terms, and should perhaps have been made the second section, as it contains a general prohibition of every variety of unjust discrimination. The section covers two subjects. The first paragraph prohibits the giving of any undue or unreasonable preference to any particular person or locality, or any particular description of traffic, in any respect whatever, and declares such a preference unlawful, which by section 7 is made a misdemeanor punishable by fine. This covers in general terms, though by no means so completely, the provisions of section 2 as to discriminations against persons, but goes further and includes discriminations against localities or particular descriptions of traffic. The language adopted in this paragraph is substantially that of the English statute on the subject, which has been repeatedly construed by the English courts,

so that its meaning has already been judicially established."

In the second session of the Forty-ninth Congress, Senate Bill 1532 occupied a prominent place in the discussion, both in the Senate and in the House of Representatives, as it was adopted by the conference report which had stricken out the provisions of the so-called Reagan Bill of the House and substituted Senate Bill 1532.

Much of the controversy in the Senate dealt with the provisions of the Fourth Section, with particular reference to the long-and-short-haul clause. On January 10, 1887, during the debate on the conference report and during the discussion of the same by Senator Cullom, the following colloquy occurred (page 99) (italics ours):

"Mr. Hoar: I will put an illustration. The port of Boston, in Massachusetts, has a foreign commerce of about $125,000,000 annually. It was larger than that three or four years ago, but the change is not in the amount of commerce, but in the value of the articles exported and imported. That was the amount last year. Now, probably, of the exports, which are seventy odd millions of dollars, between thirty and forty millions consist of cotton, cattle, wheat, corn, hams and bacon, and lard—the food products of the West and the cotton of the South. Every ton of that produce exported today I suppose is taken from a place in the country which is from 150 to 250 miles nearer to New York, Philadelphia, and Baltimore. Now, the railroads give a rebate of five per cent. on all those exported articles. On that export trade of course depends a corresponding import trade, which otherwise we should not get at that port.

Have we got, under this bill, to put down all the local business of Massachusetts, the cotton which is taken to her factories to be used there and the food products which are brought to feed her people, to the New York rates, that is to the rates of carriers who do not have to carry the goods so far by 250 miles; or have we got to give up that export trade; or is this great export

trade of the second commercial city of the country to depend on whether five commissioners happen to think that is or is not a special case?

Mr. Cullom: Mr. President, it may be said to be rather unfortunate that Boston is a little farther away from the center of gravity than New York; but *I do not think, myself, that there is anything in this bill which prohibits a railroad from carrying to Boston just as cheaply as it carries to New York* from Chicago or Omaha or San Francisco, and there is not anything now that prevents it.

Mr. Hoar: I do not think the Senator quite apprehends the force of my statement. The bill does not make New York a comparison; but does it not say that a company shall not carry over the same line of road to other points in Massachusetts the same article at a larger price than it charges this foreign commerce—that is the proposition—unless the commissioners come in and make an exception? Then the railroads have got to put down the whole railroad transportation in cotton and food products in Massachusetts along their lines to the New York rates if they put down the exports from Boston to the New York rates, and that they can not do under the laws of trade, because, of course, the other road, which is 250 miles nearer, has the advantage.

Mr. Cullom: So far as this section is concerned, when a load of corn, wheat, cattle, or what not, is started from Chicago, *there is nothing in this bill that prohibits the transportation company taking the product in a car from Chicago at exactly the same rate to Boston that it takes it to New York*—not a single line. The only question, then, is a question as to whether the railroads will carry the products as cheaply to Boston as to New York. In my own judgment they will."

On January 20, 1887, Congressman La Follette of Wisconsin, in discussing the conference report, said (653-4):

"The key-note of the whole measure is sounded in the first section, which declares that all rates shall be reasonable and just. The next few sections, until we come to the provision for the establishment of the commission, little more than specify and forbid special

practices of railways which are in violation of this principle.

It is unjust and unreasonable for a common carrier to charge one person more than another for the same service, under similar circumstances and conditions, so the second section prohibits special rates and drawbacks. And all devices which are a means to this end are prohibited and declared unlawful.

The third section involves exactly the same principle, but especially directs its application to the prevention of preferences being given to one place or kind of traffic to the prejudice or disadvantage of any other place or kind of traffic.

The much-discussed fourth section seems to me to be little more than a corollary to those which precede it. The practice of charging more for a short than for a long haul when the shorter is included within the longer presents on its face an unjust discrimination. Hence, the section specifies such cases as violations of law. This would doubtless have been the judgment of the courts in most instances when such cases came before them for determination without this express provision. The value of this as well as the two preceding sections lies in the fact that the application of the law is here made certain and definitely settled in a large class of cases, and in some measure a proportionate amount of litigation will be thereby forestalled and obviated."

We have quoted thus at length from the debates in the Senate, realizing, of course, that the debates in Congress expressive of the views and motives of individual members are not a safe guide and hence may not be resorted to in ascertaining the meaning and purposes of the law-making body, but reports of committees of the House or Senate have been upon a more solid footing and may be regarded as expressive of the legislative intent in a case where otherwise the meaning of a statute is obscure. The principle has been extended to include explanatory statements in the nature of a supplemental report made by the committee

member in charge of a bill in course of passage. *Duplex Printing Press Co.* v. *Deering*, 254 U. S. 443, 474; 65 L. ed. 349, 360.

The foregoing reports and debates may be judicially noticed by this court. *New York Indians* v. *United States*, 170 U. S. 1, 32; 42 L. ed. 927, 938. To the same effect is the holding in *Arizona* v. *California*, 283 U. S. 423, 454; 75 L. ed. 1154, 1165, and in *Atlantic Cleaners & Dyers, Inc.* v. *U. S.*, 76 L. ed. Adv. Ops. 795.

From the plain language of Section 3 and from the legislative history, including the debates, (if there be need to refer thereto), it is clear that any locality may make complaint of a violation of the Interstate Commerce Act.

The primary purpose of Congress in enacting the Interstate Commerce Act was to relieve persons, particular kinds of traffic, and localities from unjust discrimination and undue preference or prejudice. Not only the person in his relation as shipper to carrier, not only the traffic of that shipper, but the locality at which the shipper delivered or received the traffic must be kept free from unjust discrimination and undue prejudice.

As we read the question to which the attention of counsel is invited by the court, it involves something more than the mere right of Galveston to make complaint to the Interstate Commerce Commission, and to answer the question requires a consideration of the pertinent circumstances and conditions shown of record. In other words, to answer the question requires a consideration of the facts to ascertain whether undue prejudice exists against the port of Galveston and whether an undue preference exists as to the port of New Orleans.

The purpose of Congress, as evidenced by the report and the debates heretofore referred to, was to strike down all forms of prejudice and preference which were undue; Sec-

tion 3 is all-embrasive, forbidding undue preference and undue prejudice of every kind; Section 2 deals with the particular form of discrimination in the nature of rebates, etc.; and Section 4 forbids that particular form of discrimination as between persons and places, where less is charged for shorter distance than for longer distance, the shorter being embraced within the longer haul. From the history of these sections it is clear that it was not intended to prohibit a carrier from meeting competition of another carrier so long as a burden was not cast upon other traffic.

It was the expressed judgment of the chairman of the Senate Committee that if the common carriers of the country proceed in the discharge of their honest duties as common carriers and construe the words of the statute liberally, they could continue to carry the products of the west to the city of Boston, to be transported beyond by water without interference by the Commission, by the courts or anybody else. That interpretation was accorded by this court in the *Import Rate Case*; it has been accorded by the Commission in practically every case, except the one under review.

Thus in *Export and Import Rates, Fourth Section Application 2040*, 169 I. C. C. 13, the Commission granted reduced competitive rates on export and import traffic. In that case the carriers serving the south Atlantic and Gulf ports requested permission to maintain rates between interior points, such as Chicago, and the south Atlantic and Gulf ports, in competition with the carriers serving the north Atlantic ports, on import and export traffic without reducing intermediate rates. The reasons advanced by the lines reaching from Chicago to the south Atlantic and Gulf ports for meeting the competition of the direct lines to New York and Boston, were the same as those advanced by the New Orleans carriers in the instant case. There Boston and other north

Atlantic ports, joined with the rail carriers serving those ports in protest against granting the relief sought by the Chicago, south Atlantic and Gulf carriers. The decision in *Fourth Section Application 2040* was dated December 2, 1930, while the decision in the instant case was dated December 23, 1929. The Commission granted the Chicago, south Atlantic and Gulf ports carriers permission to maintain rates which were as low as 65 per cent of maximum reasonable rates, in order to compete with the north Atlantic ports for import and export traffic because such rates were necessary in order that the southeastern carriers might compete with carriers serving north Atlantic ports in respect of export and import traffic. The shrinkage permitted in order to meet this competition was 35 per cent of the reasonable rates which the Commission had theretofore prescribed on domestic traffic.

In *Oklahoma Corporation Commission case*, 98 I. C. C. 183, 265, the Commission prescribed a single-line rate on cottonseed cake and meal in the southwest for 500 miles of 34 cents, and that rate is applied to Galveston from all points 500 miles distant. Assume that from a common origin it is twice as far to New Orleans, or 1,000 miles; for that distance the Commission prescribed a maximum reasonable rate of 44 cents. Port equalization would require the New Orleans lines to publish 34 cents, which is 77.5 per cent of the maximum reasonable rate for 1,000 miles, a shrinkage of only 22.5 per cent. The Commission, however, granted the direct lines serving the south Atlantic and Gulf ports permission to shrink their rates 35 per cent, or approximately 50 per cent greater shrinkage than was permitted the New Orleans carriers in the case under review. Moreover, the discrimination permitted as between the domestic traffic and the import traffic moving through the south Atlantic and Gulf ports reached its maximum at 35 per cent of the domestic rate without becoming undue prejudice,

while in the instant case, using an extreme example, a discrimination of only 22.5 per cent was found to be undue preference to New Orleans. The Commission had to consider Section 3 in disposing of the application of the south Atlantic and Gulf ports carriers because the north Atlantic ports and the eastern carriers protested that the establishment of the proposed rates between Chicago and the south Atlantic and Gulf ports would be unduly prejudicial to the north Atlantic ports and unjustly preferential of the southern ports, in violation of Section 3. There the Commission accepted the necessity of establishing an adjustment of rates which would enable foreign commerce to move freely through southern ports as a justification for the relief prayed for, and it was held that Section 3 did not render unlawful the competitive rates which the Southeastern carriers were permitted to establish.

Let us take a more concrete example. Exhibit B-17, reproduced in Volume VI of the printed record, shows short line distances from Sweetwater, Texas, of 722 miles to New Orleans and 456 miles to Galveston, both distances being made via joint-line routes. The rate scales on cottonseed cake and meal shown on page 265 of the report in the *Oklahoma Corporation Commission Case, supra*, provide for these distances maximum reasonable joint-line rates of 39 cents and 34.5 cents respectively, a difference of only 4.5 cents. The 1927 order of the Commission, however, as applied to carriers generally and as extended to the Texas & Pacific in the 1929 order, requires that the Louisiana port lines must publish to New Orleans from Texas points in differential territory rates which exceed those to Galveston by 5 cents per 100 pounds. (Rec., 3417-3456.)

Assuming that the rate to Galveston is published on the basis of the maximum scale, this would make the differential rate to New Orleans actually higher than if the maximum scale were applied to that point.

In some cases the order of the Commission in this case will permit a shrink below what has been heretofore prescribed as a maximum reasonable basis but in no instance will that shrink be as great as the Commission permitted in adjusting export and import rates to and from south Atlantic ports in *Fourth Section Application 2040, supra.* For example, the same Exhibit B-17 shows from Dallas joint-line distances of 489 miles to New Orleans and 290 miles to Galveston. For these distances the maximum reasonable rates on cottonseed cake and meal prescribed in the *Oklahoma Corporation Commission Case, supra,* are 34.5 and 27.5 cents, respectively. Under the order in the instant case, if the Texas port lines published the maximum reasonable rate of 27.5 cents from Dallas to Galveston the Louisiana port lines must publish a rate 5 cents higher, or 32.5 cents to New Orleans. That rate is 2 cents less than the maximum reasonable rate for the Dallas-New Orleans distance and the shrink permitted below the maximum reasonable basis is only 5.8 per cent. This is contrasted with the 35 per cent shrink below the maximum reasonable basis permitted by the Commission in the export and import adjustment to and from south Atlantic ports.

In making this comparison we are not to be understood as approving the limit placed by the Commission on competitive export and import rates in *Fourth Section Application 2040.* In that case New Orleans interests contended that even lower rates than those approved by the Commission would be lawful. Be that as it may, if the Commission in the instant case had attached the same importance to competition between ports and between rail routes as it did in the case cited, in no instance would the equalized rates have been condemned.

It may be fairly said that the only reason the Commission refused in the instant case to permit the Louisiana port lines the same latitude in meeting competition as they per-

mitted the southeastern carriers in *Fourth Section Application 2040,* rests in the assumption on the part of the Commission that it has the power to prescribe such rates as in its judgment will equalize commercial and economic advantages and disadvantages as between rival ports.

We point to the action of the Commission in *Fourth Section Application 2040* as being in line with the opinion expressed by Senator Cullom and others when the Act was originally enacted, and also with prior decisions of this Court, while in the instant case the Commission's action not only is in conflict with its own prior decisions, with the decisions of this Court, but with the views of those who enacted the statute forty years before.

Viewing the history of the Act and its interpretation by the Commission and by the courts, it is clear that the relations of the Louisiana ports to the export, import and coastwise traffic affected in and to the rates condemned by the Commission are not such that the Louisiana ports are localities unduly or unreasonably preferred by such rates, and the Texas ports may not be regarded as localities unduly or unreasonably prejudiced by such rates within the sense and meaning of Sections 3 (1) and 15 (1) of the Interstate Commerce Act. The question presented is purely one of law and does not require the exercise by this court of its independent judgment upon the facts of record. The question upon which the attention of counsel was invited by the court in its order of May 31, 1932, should be answered in the negative.

SUMMARY.

(a) All orders complained of are void because they are founded on the Commission's conception of commercial and economic needs of Galveston and are not founded on transportation conditions. This statement is true because of the following facts:

1. The only transportation condition shown of record or found by the Commission is that the length of haul to New Orleans is longer than to Galveston. That additional haul, however, is the same on all commodities from any point in differential territory, yet the Commission exempted petroleum in this case, black strap molasses in a subsequent case and cotton in a prior case. Only commercial and economic conditions distinguished the commodities referred to.

2. Discussion of various subjects in the reports of the Commission, indeed, the reports as a whole, not only show that complainant based its case on Galveston's disadvantages from an industrial standpoint and its need for relief in rates in order to offset New Orleans' many natural and acquired advantages, but that the relief granted by the Commission was designed for the purpose of overcoming Galveston's disadvantages and New Orleans' advantages.

3. No proof of injury to Galveston was shown to follow from equalized rates. Indeed, the Commission found that measured by the net tonnage and the number of vessels entered and cleared, the Galveston district had progressed somewhat faster than the New Orleans district. To use the language of Commissioner Hall in his opinion dissenting from the conclusion reached by the majority but not from the facts found of record (Rec., 3431):

> "In the case before us there is no persuasive showing that the Texas ports have had a less healthy devel-

opment of traffic than New Orleans, for example. Considered as a whole they have gained far more than New Orleans both in percentage and in total tonnage."

During the eleven year period from 1915 to 1925, the movement of export wheat through New Orleans was 273,703,166 bushels and through Galveston 273,562,266 bushels. The total export, import and coastwise movement in 1924, the last year shown, for New Orleans was 11,400,862 tons while Galveston and Houston combined handled 11,548,314 tons, and all the Texas ports combined handled 29,917,954 tons. Using 1912 as the index at 100, the total export, import and coastwise traffic was in 1924, New Orleans 225, Galveston and Houston combined 250, and all Texas ports combined 334. (Rec., 3434.)

4. The rates and method of publication of rates prior to the Commission's decision were the same via Texas ports and via Louisiana ports. Tramp steamers when chartered gave the right to the shipper to load at any gulf port on the same rate; indeed, the Commission found in its first report (Rec., 3348) that the steamship rates from and to foreign ports are usually the same to and from all the ports mentioned. In the second report (Rec., 3387) a similar finding was made with the additional statement that the maximum ocean rates are fixed by the Gulf Shipping Conference and, except on so-called distress shipments, particularly on grain, are generally the same coastwise and foreign from and to all Gulf ports.

On this record it is clear that Galveston has not suffered injury from the equalized rates, that there are no different transportation conditions other than mere distance, and that the Commission's action was directed by its consideration of the commercial and economic needs of Galveston and the belief that New Orleans' advantages were so great that it could still be deprived of a material tonnage and continue

as an important port for the handling of import, export and coastwise traffic.

(b) Equalized rates on export, import and coastwise traffic have been shown not to violate Section 3 so long as (1) the Galveston rate is not too high; (2) the New Orleans rate is not so low as to throw a burden on other traffic; and (3) that equalization is necessary if the New Orleans carriers are to compete for the traffic, of which the ports are but junction points between rail and water carriers.

In support of this we cite the decision of this Court in *Philadelphia & Reading* v. *U. S.*, 240 U. S. 334; 60 L. ed. 675, where this court, accepting the facts as reported by the Commission, held that they afforded no foundation for the Commission's findings and order, and held that Jersey City was not subjected to any undue or unreasonable prejudice or disadvantage in respect of freight rates on cement from the Lehigh cement district, because a carrier, while maintaining or participating in joint rates on cement to eastern destinations, such as Baltimore, Philadelphia, New York, and New England points, which are not higher from Evansville, Pa., than the contemporaneous rates which it maintains or participates in from other cement mills in the Lehigh district, refuse contemporaneously to participate in the same relative adjustment on the cement traffic from Evansville to Jersey City for local consumption where the Jersey City rate is intrinsically reasonable and non-discriminatory, in relation to rates accorded other consuming points. The rate from Evansville, a point local on the Philadelphia & Reading, via Allentown and the lines of other carriers to Jersey City, was $1.35 per ton, while the rate from points on connecting lines in the same vicinity to Jersey City was 80 cents per ton, the Philadelphia & Reading, however, not participating in the 80 cent rate. Evansville takes the same rate as other mills to destinations

other than Jersey City. The Commission did not pass upon the reasonableness of either the 80 cent rate or the $1.35 rate to Jersey City. This Court said (240 U. S., at page 337; 60 L. Ed., at page 678):

> "We must assume the Jersey City rate of $1.35 is intrinsically reasonable and nondiscriminatory in relation to those accorded other consuming points; and, plainly, if this were put in by all carriers, the Commission's order would be complied with and the supposed discrimination disappear. It must be taken as true that no rate above what all might lawfully establish is being demanded by any carrier; and, with one exception, they are paid 40 per cent less than that amount. If a universal rate of $1.35 could not justly be complained of by the locality, certainly *it* is not discriminated against or unlawfully prejudiced, because, failing to agree, most of the carriers have established an 80-cent schedule. In the circumstances disclosed it is impossible rightly to conclude that Jersey City is being subjected to 'any undue or unreasonable prejudice or disadvantage.'
>
> As the facts reported afford no foundation for the Commission's findings, enforcement of the order based thereon must be enjoined. The decree below is accordingly reversed and the cause remanded for further proceedings consistent with this opinion."

Just as in the *Philadelphia & Reading case,* so in this case the Court should hold that the facts in the decision of the Commission afford no foundation for the Commission's findings, and enforcement of the order should be enjoined.

(c) There was no evidence as to what the differential should be and all that the Commission had on the subject was the request of the complainant for differentials and testimony as to the effect of differentials. The only evidence before the Commission consisted of mileage and the proposed differentials.

In the 1927 decision of the Commission (Rec., 3392) the Commission found:

> "On the heavy-moving commodities, such as grain and petroleum, a rate difference of one cent per hundred pounds will normally turn a sale and control the movement through one port or another. If, therefore, the shipper or exporter who ships largely or wholly through the Texas ports could secure a differential under New Orleans on his shipments he would be advantaged to that extent as compared with his competitor who ships largely or wholly through New Orleans. Conversely, the shipper or exporter who is primarily interested in New Orleans would be placed at a disadvantage under such a differential in shipping from or to points in the affected territory."

In the 1927 report the Commission modified the differentials which it had prescribed in the 1925 report, making substantial reductions in the amount of the differential. The Commission said as to the level of these differentials (Rec., 3415):

> "Certain protestants urge that if differentials are to be prescribed those originally ordered are greater than necessary to accomplish the purpose intended. This criticism has particular reference to the differentials prescribed on grain and petroleum and their products. It is not necessary to consider further petroleum and its products. On the other commodities the differentials prescribed herein reflect our best judgment as to the minimum reasonable and non-prejudicial differentials which should be maintained on this traffic."

The differential on grain and grain products of 3 cents from southern Kansas and 4 cents from Oklahoma and 5 cents from Texas prescribed in the 1925 report was reduced to 1 cent from points on and north of the lines of the Rock Island from Oklahoma City through Clinton, Okla., and Amarillo, Texas, to the Texas-New Mexico state line, and 2 cents from points in Oklahoma and Texas south of the Rock Island.

Material reductions in the differentials on other commodities were made except in the case of green coffee to Texas, cotton factory products and related articles from Texas, and lumber and forest products, rice and rice products, and rosin from southwestern Louisiana, and turpentine from southwestern Louisiana and Texas. The Commission recognized that the differentials prescribed on most of the commodities, if applied in full under the rates to or from New Orleans, or over the rates to or from the Texas ports, would result in severe differences in rates to the same port, from or to contiguous points on both sides of the border line between differential and so-called equalized territories, and stated that such differences are inherent in group adjustments, but that the same could be mitigated by the carriers if they would apply the differential in part to the rate to or from New Orleans, and in part to the rate to or from the Texas ports, or by applying a graded differential at intermediate points in so-called equalized territory. On other commodities on which differentials were not specifically required, the Commission stated the relationships on the prescribed commodities should serve as a guide to the defendants in readjusting rates on other export, import and coastwise traffic wherever undue prejudice, such as it condemned in the report, existed. (Rec., 3419-3420.)

In the 1929 report the Commission reaffirmed the measure of the differentials prescribed in the 1927 report. (Rec., 3456.)

We believe the record wholly fails to contain any evidence upon which the Commission could fix the prescribed differentials, as the only evidence which it considered was mileage between the various points, the differentials proposed by the complainants and the testimony as to the effect of differentials on some of the commodities, such as grain and

petroleum. Taking the report as a whole and the record in its entirety, it cannot be denied that these differentials were based on commercial conditions, were required to be established in order to equalize commercial conditions, and therefore, were without proper basis in evidence. The orders prescribing differentials are therefore void.

(d) What has heretofore been said in summarization of our contentions has been directed to showing that the orders of 1925 and 1927 were void in their entirety. The 1929 order is not only void for the same reasons as urged against the 1925 and 1927 orders, but is also void because of the erroneous construction given by the Commission to Section 3 as applied to the rate structure maintained by the New Orleans port lines, from and to points located on their lines. In respect of that portion of the rate structure, we have shown that there is no violation of Section 3, since the New Orleans port lines are not responsible for and do not control the rates to and from the Texas ports, from and to points on their lines.

For the reasons stated in our original brief and in this supplemental brief the Court should hold the orders complained of void in their entirety and should set the same aside.

Respectfully submitted,

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September 19, 1932.

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In the

Supreme Court of the United States

OCTOBER TERM, 1932

No. 1

The Port Rate-Relation Case

THE TEXAS AND PACIFIC RAILWAY COMPANY et al.,

Appellants,

versus

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION et al.,

Appellees.

REBUTTAL BRIEF, ON REARGUMENT, FOR THE TEXAS AND PACIFIC RAILWAY COMPANY, LOUISIANA & ARKANSAS RAILWAY COMPANY, AND LOUISIANA, ARKANSAS & TEXAS RAILWAY COMPANY, APPELLANTS.

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October 6, 1932.

Warlick Law Printing Co.—Dallas

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Foreword

The brief for the carrier appellees[1] is as significant in its omissions as in its contents. Nowhere therein is

1 The only brief for appellees on reargument received at the time of this writing. The brief for the United States and the Interstate Commerce Commission, hereinafter referred to as the government, was received after the first part of this brief was written. Much that is said therein, however, answers the contentions on the part of the government as well as on the part of carrier appellees.

it attempted to deny that when Congress enacted the original act to regulate commerce it did not intend a prohibition of port equalization, but affirmatively contemplated continuance of that practice. Nor is there any serious effort made to explain how, this being so, section 3(1), which has not been changed by subsequent legislation, can now be construed to defeat the right of such equalization. Resort is had, it is true, to the rule of contemporaneous construction; but it is perfectly plain that by no amount of construction can the Commission invest itself with a power withheld from it by Congress.

Considerable argument is made by the carrier appellees (hereinafter called appellees) that the Commission was not by the orders in controversy attempting to regulate industrial conditions, but to remove a transportation discrimination. Yet appellees do not even hazard an explanation of how, under the transportation standard, the exemption of certain commodities, such as petroleum, can be justified. Their silence on this point is conspicuous and significant.

The brief for appellees devotes some space to the proposition that the action of the Commission in granting fourth-section relief constitutes no precedent for its action herein. The discussion concerns itself, however, with the question of circuity limitations in the respective cases, which is beside the point; and there is no genuine effort to meet the essential contention on this

score. Appellees do not answer or attempt to answer the very pertinent question raised by these appellants: How can the same character of competition justify a discrimination under section 2 (*Texas & Pacific Ry. Co.* v. *Interstate Comm. Comm.*, 162 U. S. 197) and under section 4 (*Export and Import Rates*, 169 I. C. C. 13), and not under section 3? Here again their silence speaks volumes.

Appellees admit that in *Export and Import Rates* "the Commission found that the adjustment approved would not result in undue preference or prejudice." But they do not so much as suggest any difference between the factual situation in that case and the one in the case at bar. They therefore necessarily concede that the difference in the findings in the two cases arose from the application of different principles of law—and this, these appellants submit, illustrates very conclusively the arbitrary, unreasonable and erroneous action of the Commission herein.[1]

1 The brief for the government does not, any more than the brief for carrier appellees, explain how the exemption of petroleum can be justified if the orders in controversy were in reality designed to remove a transportation discrimination. Nor does it attempt to explain the difference in the principles of law applied in **Export and Import Rates** and herein. Indeed, **Export and Import Rates** is not even cited by the government.

I. The Question is Not Whether a Port May be Regarded as a Locality Within the Meaning of Section 3(1), but Whether the Ports in this Case Have Such a Relationship to the Traffic Affected and to the Condemned Rates as to Come Within that Section.

(a) In their brief the appellees, undoubtedly sensing the weakness of their position on this question, point out that the complaint filed with the Commission contained an allegation relating to various firms and individuals engaged in commerce at Galveston; and they declare that the orders of the Commission were responsive to this as well as to the allegation of injury to the port. Allegations alone, however, do not, when denied, support judgments, and there is no *finding* of injury to any individual, company, firm, or corporation. The evidence would not support such a finding.

The case was both prosecuted by complainants and decided by the Commission on the theory that it concerned port interests, those interests with respect to which the Commission remarked: "A port is neither the destination nor the origin of traffic passing through it. It levies toll on the traffic, in substantially the same manner as do common carriers, in its charges for the use of its facilities in the transfer of traffic between rail and water carriers" (128 I. C. C. 369). Commissioner Hall, dissenting, pointed out that the shippers were altogether lost from sight (128 I. C. C. 399).[1]

1 That dissenting opinions may be looked to as an exposition of the principles upon which a decision rests, see **Southern Pacific Co.** v. **Interstate Comm. Comm.**, 219 U. S. 433, 449-50; **Chicago, R. I. & P. Ry. Co.** v. **United States**, 274 U. S. 29, 33.

As for complainants, their star witness, while contending that "Galveston is really hurt by those rates being equalized," admitted that "I can not point out the names of the parties and the manner in which they are injured * * *. The *port* is hurt by reason of the fact that the rates are the same to Galveston as to New Orleans * * *" (emphasis supplied; R. 1859). And at the very end of the case he further disclosed the antithesis between shippers and ports, and the principle upon which it was sought to invoke the aid of the Commission: "I do not object to the interior shipper getting a reasonable or proper rate from New Orleans, but the Texas ports, Galveston, for instance, must be able to offer the shippers some inducement to patronize this port in competition with New Orleans" (R. 3038).

(b) The question to which attention was invited by the Court is not whether a port may constitute a locality within the meaning of section 3(1); but whether the Texas and Louisiana ports have such a relation to the traffic affected and to the rates condemned by the orders in controversy as to call that paragraph into play. Now the traffic affected moves through the ports and the condemned rates were maintained for the purpose of preserving an equality of through rail and water charges via the various ports on the traffic. Thus even if we disregard the express intent of Congress in enacting the original act to protect only shippers, we have the problem

whether, under such circumstances, the complaining ports may claim the protection of section 3(1). This is very different from the question discussed by appellees. The cases upon which appellees rely do not support their position but on the contrary for the most part affirmatively support that of appellants.

Re Export Trade of Boston, 1 I. C. C. 25, involved a petition by certain New England roads praying that the Commission authorize their connecting trunk lines "to bill export freight to Boston at New York rates, or to take such other action as may seem best in order that this business may be continued upon as fair and favorable a basis as it has been hitherto." It appeared that the roads had established on export traffic to Boston a system of rebating, the practice having, in the Commission's words, "been adopted in a spirit of fairness to Boston and as a convenient method for equalizing the rates from western points to the foreign market, whether the route shown by the shipper be by way of Boston or of New York" (l. c. 26). The Commission found that no action by it was necessary and gave leave to withdraw the petition, observing (l. c. 27):

> "This alleged necessity for the equalization of rates on export traffic is relied upon as the justification for the higher rate which is imposed on the traffic whose final destination is Boston, * * *. If such is the real nature of the so-called rebate—if its purpose is only to do indirectly what might di-

> rectly be done by a bill of lading at the interior point of shipment for the delivery of the goods at the foreign destination, and if no discrimination is made between persons engaged in the foreign traffic, but the rebate is paid impartially, and only as a means of protecting the Boston route for the export trade against an excess in charge that would be ruinous to it, then it is obvious *there is no occasion for calling upon the Commission to give sanction to a practice which would be legal without it*" (emphasis supplied).[1]

New York Produce Exchange v. *Baltimore & O. R. Co.*, 7 I. C. C. 612, is relied upon by appellees. It does not, however, support their contention, because: (1) the competency of the complainant to maintain the complaint was not brought in issue; (2) the complaint and the differentials assailed covered all traffic and not merely foreign traffic. As a matter of fact, the decision affirmatively supports the contention of the carrier appellants herein, inasmuch as the Commission dismissed the complaint upon an express approval of the principle of adjusting inland rail rates so as to maintain a substantial equalization of through rail and water rates via the various ports. As to this it said explicitly: "The princi-

1 It is interesting to note that this is the same situation that formed the subject of the colloquy between Senators Hoar and Cullom at the time the original act was pending in Congress, at which time the latter expressly denied that there was anything in the act to prevent the railroads from carrying export traffic to Boston just as cheaply as to New York. See Brief on Reargument for these appellants, pages 27-28.

ple upon which these differentials have been established is legitimate" (l. c. 682).

In *In the Matter of Differential Rates*, 11 I. C. C. 13, the Commission again approved the precise principle for which the carrier appellants herein contend. True, it made certain recommendations regarding changes in differentials; but it is clear that in doing so it was voicing an extra-official opinion with respect to fairness or advisability, and not undertaking a judicial pronouncement. In so far as it announced a principle of law it followed the *New York Produce Exchange case* and held with the carrier appellants herein (l. c. 64-5):

> "If these differentials fairly recognize the advantage of Baltimore and Philadelphia, upon what theory can they be reduced or abolished? It is said that these cities labor under certain disadvantages in the way of water transportation as compared with New York and Boston. Now, what can be more just than to give to each port the inland rate to which its location entitles it and to let it obtain such portion of this export traffic as its ocean facilities can win for it? Does not this award to each locality the exact benefit of its location and is not any other rule to an extent unjust?
>
> "The answer is found in the fact that this traffic does not stop at the port but is carried to foreign destinations. The port of export is but a single station as it were upon the through line.
>
> "This traffic in point of fact originates at a great number of interior points and reaches numerous

foreign destinations, but we may assume for the purpose of illustration that it all comes from Chicago and all goes to Liverpool. It is apparent that it may be transported between these points by any of the four ports in question. The distance by rail is somewhat shorter to Baltimore and Philadelphia than to Boston and New York. Upon the other hand the water distance is somewhat less from Boston and New York than from Philadelphia and Boston. The entire through distance does not greatly vary. In other words this traffic is fairly competitive and rates ought, therefore, to be so adjusted that rival routes can fairly compete for it.

"Apply for a moment the rule suggested by Baltimore and Philadelphia to the movement of this traffic. * * *The domestic rate to Boston is 2 cents higher than to New York upon low grade freight and considerably more upon the higher classes. Now, what would be the result if carriers were compelled to charge their domestic rates upon export traffic? Plainly it would shut up the port of Boston. This fact has been obvious from the first, and it has always been conceded that export rail rates to Boston might be lower than domestic rates and not higher than export rates to New York. * * * Nothing can be more certain than that these inland rates upon export traffic should be treated as a part of the entire through rate."[1]

Cosmopolitan Shipping Co. v. *Hamburg-Amer. Packett Co.*, 13 I. C. C. 266, did not involve ports or section

1 Cf. the pronouncement of the Commission herein that the contention of the Texas & Pacific that the inland rail rates should be considered as only a part of the through rates, is "without merit" (R. 3405).

3. It was a complaint by one trans-Atlantic line against another and was dismissed by the Commission for want of jurisdiction.

Chamber of Commerce of New York v. *N. Y. C. & H. R. R. Co.*, 24 I. C. C. 55, and the companion case, *In the Matter of Import Rates*, 24 I. C. C. 78, are no authority for appellees' position. It is true that the Commission assumed to prescribe differentials as against the ports, but it admitted the right to equalize, saying as to the Boston and New York situation (l. c. 77): "We think that as to this traffic it would not be unjustly discriminatory for defendants to maintain the same rates to and from New York and Boston." Aside from this, the proceeding was in reality in the nature of an arbitration begun on the request of the carriers as well as the ports, and no order was issued. Insofar as the Commission purported to have authority itself to adjust export differentials, it acted clearly contrary to the intention of Congress, not only at the time the original act was passed, but later when the same question arose in connection with the passage of the Hepburn Act. This will be discussed more fully later.

Mobile Chamber of Commerce v. *Mobile & O. R. Co.*, 57 I. C. C. 554, is cited by appellees. The report in this case does not reveal that the rates condemned were aimed at a parity of ports on traffic moving through them, nor that there was any competitive situation such as faces

the carrier appellants herein. To the extent that the Commission assumed power to adjust differentials as between the ports, it acted beyond the authority conferred or intended to be conferred upon it by the act.

Southern Kansas Grain Ass'n. v. *C., R. I. & P. Ry. Co.*, 139 I. C. C. 641, is also relied upon. However nothing therein shows that the complainants did not have a shipping relationship to the traffic. On the contrary, the allegation, in so far as section 3 was concerned, was that complainants received less transportation service at rates the same as or higher than those paid by their competitors on direct routes; and the evidence showed that export wheat was sold f. o. b. gulf—in other words, that the interior dealers were the shippers. The fact that complainants in addition performed handling service such as that rendered by the port interests is not material, since, aside from this, they stood in such relationship to the traffic as to enable them to bring a section 3 complaint. The case is readily distinguishable from that at bar.

(c) The appellees invoke the rule of contemporaneous construction and urge that since the Commission has in certain instances purported to exercise its power at the instance and in favor of the ports, Congress must be presumed to have adopted such construction when it enacted the Transportation Act of 1920. That act did not, however, amend section 3, which indeed has not been

changed since its original enactment. And it is clear that no interpretation of that section by the Commission can override the intent of Congress in 1887.[1] Aside from this, the rule the appellees urge is of little force. At the time the Court, under the original act, denied the power of the Commission to fix maximum rates, the Commission had been doing so for years. At that time, as now, it was urged that the interpretation placed on the act by the Commission should be persuasive, but the Court brushed the contention aside without hesitance, observing that "it would be strange if an administrative body could by any mere process of construction create for itself a power which Congress has not given it." *Interstate Comm. Comm.* v. *Railway Company* (the *Maximum Rate Case*), 167 U. S. 479, 510.

Since appellees urge the contemporaneous construction rule, however, let us see what significance it has in this case. These appellants have heretofore pointed out that there is nothing novel or strange about the practice of equalizing ports. It came about by the natural force of competition in the early days. It received the consideration of Congress in the enactment of the original act, and at that time it was authoritatively stated that there was no intention to interfere with the practice. In *Re Export Trade of Boston*, 1 I. C. C. 25 (1887), *New York Produce Exchange* v. *Baltimore & O. R. Co.*, 7 I.

1 As to which, see the Brief on Reargument of these appellants, pages 14-28, inclusive.

C. C. 612 (1898), and *In the Matter of Differential Rates*, 11 I. C. C. 13 (1905), the Commission approved the principle of adjusting inland rail rates to preserve equal through rail and water rates via the various ports, although in the last it had displayed a tendency to interfere with the carriers' judgment as to the measure of the "differentials" established for this purpose. This, then, was the situation when Congress came to consider the Hepburn bill in 1906. The situation did not escape attention at that time nor were the members of Congress timid in expressing their views with regard to it.

The Hepburn Act (34 Stat. L. 584, ch. 3591) originated as H. R. 12987 at the first session of the 59th Congress. The record of the proceedings while it was pending demonstrates that the prevailing practices with regard to the adjustment of rail rates to and from the ports were fully known to Congress and that there was a considered and virtually uniform intent not to interfere with the adjustment of such rates by the railroads on competitive bases. Of a mass of evidence to this effect set out in the appendix hereto,[1] the following statements of Representative Mann of the House Committee on Interstate and Foreign Commerce are typical (emphasis supplied):

> "* * * We do not authorize the Commission of its own sweet will to change this article or that, to re-

1 To all of which attention is called on the authority of **Duplex Co. v. Deering**, 254 U. S. 349, 489; **New York Indians v. United States**, 170 U. S. 1, 32, **Arizona v. California**, 289 U. S. 423, 454.

adjust the classifications, or readjust the freight rates in this arbitrary or initiatory manner. We confine the action of the Commission to the case which is presented and prevent them from arbitrarily injuring any particular locality. *We do not give them the power to say which port shall be built up*, which city shall be preferred; we leave open the competitive forces of the railroads. The old bills which we had sought to stifle competition; *we leave competition in force. The railroads running south, west of the Mississippi, and the railroads running east, north of the Ohio, will have to fight out the question as to which road shall carry the grain for export abroad.*"

* * * * *

"If a Commision shall be created which will listen to the conflicting interests of different localities and which shall endeavor to conserve the natural advantages of one community over another, which shall endeavor to fasten upon our country zones of influence and zones of trade, which shall endeavor to interfere with or restrain the active, persistent and constant competitive forces of commodities and localities, as well as shippers and railroads, we will have entered upon a dangerous, if not a paralyzing, course" * * * (Cong. Rec., Vol. 40, Part 3, Page 2247).

"It is proposed to give to the Interstate Commerce Commission, to a limited degree, the rate-making power. The Commission may * * * decide what shall be the highest rates to be thereafter charged by the carrier. This will not prevent the carrier, in the face of competition, from lowering its rates, in order to save its share of the business * * * It [the Hepburn Bill] will *not give the Commission the power to*

> *determine differentials, the power to say whether grain from the Northwest shall be shipped for export by way of the gulf ports or the north Atlantic ports, the power to destroy the law of competition* * * *. *The former bills were intended to destroy railroad competition. The pending bill invites competition* and it preserves all the competitive forces which tend to increase economy of transportation and reduce the cost thereof" (Cong. Rec., Vol. 40, Part 3, Pages 2247-48).

In the brief filed herein by the City of Boston and Boston Port Authority as amici curiae, reference is made to excerpts from the hearings before the Senate Committee on Interstate Commerce prior to the Hepburn bill, and the contention is urged that because Congress adverted to the question whether fixing rates to the ports would violate the port preference clause of Article 1 of the Constitution, Congress intended to bring ports as such within the protection of the act. It has been observed that this case is not concerned with the general question of whether a port may claim that protection; but aside from this it is perfectly plain from the proceedings in Congress during the pendency of the Hepburn bill that there was no intention to permit ports to obstruct the competitive practices of common carriers in adjusting rates. Congress specifically refrained from anything which might prevent the adjustment of rail rates so as to establish competitive bases via all the ports

on foreign commerce—and that is the precise principle for which these appellants contend.[1]

II. In an Action to Set Aside an Order of the Commission the Court will Determine whether as a Matter of Law the Commission's Findings of Fact Sustain its Conclusions of Law and Whether its Findings of Ultimate Fact are Sustained by its Findings of Primary or Evidential Facts.

Appellees seek to prevent judicial review of the Commission's action herein by contending that since the existence of prejudice or preference is one of fact, if the Commission's finding of such fact is supported by substantial evidence it is not subject to review. This is not the law.

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1 Pages 40-42, inclusive, of the brief for the government quote portions of a colloquy between Representatives Boutell and Adamson at the time the Hepburn bill was pending. From the quotation it is concluded by the government that Congress, relying on a non-sectional administration of the act, intended to include ports within its operation. The quotation omits, however, and the conclusion overlooks, the closing remarks of Mr. Adamson at the same time:

> "* * * before our committee, in its hearings last year, there was some testimony going to show that it was desirable that power should be given the Commission to raise the rates from the Northwest to the southeastern ports, and it was specifically said that the routes running from the Northwest directly to the Eastern seaports could not compete with them * * *. **But, if, as was intimated by two or three witnesses up there, the purpose was to force the raising of the rates which were satisfactory and profitable to the carriers, because God and Nature had made the conditions favorable for a longer and cheaper haul, of course we would never consent to it.**
>
> **"In the debate on this floor during the last Congress I rose in my place and referred to it, while the gentleman from Michigan [Mr. Townsend] occupied the floor, and he assured me that in this enlightened day and generation there could be no fears of any such outrage being perpetrated on our commerce"** (Cong. Rec., Vol. 40, Part 2, Page 1777; emphasis supplied).

It is true that the existence of preference or prejudice is a fact to be found by the Commission. It is not, however, a fact the finding as to which will not be examined by the Court. These appellants do not seek to have the Court review the Commission's findings of objective or primary facts, such as distance, service, measure of rates, and the like. Preference or prejudice is not such an objective fact, but a fact the determination of which must be reached by abstract reasoning from objective facts. Of a similar ultimate fact, public necessity, the court said in *Great Northern Ry.* v. *Minnesota*, 238 U. S. 340, 345:

> "The facts being established, the question thus presented is whether as a matter of law they are adequate to support a finding of requisite public necessity—the mere declaration of a Commission is not conclusive."

The processes by which the Commission reaches, from the primary or evidential facts before it, its finding of ultimate fact, will be examined by this Court on appeal. In *Interstate Commerce Commission* v. *Diffenbaugh*, 222 U. S. 42, 46, the Court said:

> "We agree with the court below that this decision is erroneous in its conception of the grounds on which under the statute an advantage may be pronounced undue."

And in *Central R. R. Co.* v. *United States*, 257 U. S. 247, 256-57:

> "But the question presented here is whether the discrimination can be held in law to be attributable to the appellants * * *. No finding by the Commission can prevent the review of such questions."

In *Philadelphia & Reading Ry.* v. *United States*, 240 U. S. 334, 340-41, the Court said: "As the *facts reported* afford no foundation for the Commission's findings, enforcement of the order based thereon must be enjoined" (emphasis supplied). This case, strongly against appellees, they seek to explain away on the ground that Jersey City had not complained. But the rationale of the decision was not this, but that "in the circumstances disclosed it is impossible rightly to conclude that Jersey City is being subjected to 'any undue or unreasonable prejudice or disadvantage'" (l. c. 341).

These appellants do not beseech the Court to reexamine the evidence of record or to weigh it for the purpose of determining whether the Commision's findings of primary or evidential facts are correct. In this respect their contention is merely that the findings of primary fact do not support the ultimate finding of undue preference and prejudice. This question is clearly reviewable by the Court.

III. These Appellants Do Not Contend That There Must Be "Unhampered" Control of the Rate Structure Before a Finding of Undue Prejudice Can Be Made, but Only that There Must Be Effective Participation by the Carriers Sought to Be Charged.

In the brief for appellees it is asserted (page 36) that these appellants contend that a single carrier must have "unhampered" control of the rate structure to be charged with undue prejudice. Such is not appellants' contention. They submit merely that there must be effective participation in both the allegedly preferential and allegedly prejudicial rates before a carrier may properly be charged with a violation of section 3. The considerations in support of this proposition are both logical and practical and merit careful attention.

Initially it should be noted that such a construction and application of the act would not, as appellees contend, remove a large part of the rate structure from the Commission's control. In numerous cases discussed by both appellants and appellees the situation was such that a valid section-3 order could be made without contradicting the principle for which appellants contend. "Unhampered" control might be found only where one line served both points with its own rails; but sufficiently effective control to bring the carrier within the principle urged by appellants would be found in numerous instances. There is nothing in the books to indicate that

the aggrandizement of power sought by the Commission when it overturned the doctrine of *Ashland Fire Brick Co.* v. *S. Ry. Co.*, 22 I. C. C. 115, was based on a practical necessity in this respect. And, on the other hand, the new principle affirmatively contravenes the considered policy of Congress in establishing a competitive system of common-carrier regulation.

On this question again the omissions of appellees are significant. These appellants submit—and they believe the logic irrefutable—that there is just as much reason for exempting a carrier from the operation of section 3 when it does not participate in a controlling way in the assertedly preferential rates, as in a case where it does not participate at all. It is admitted on all sides that if the Texas & Pacific, for example, did not participate in rates to the Texas ports at all, it could not be liable under section 3. Yet the situation is not changed by the participation which in fact exists. The rates from competitive points, such as Dallas, to the Texas ports, are made by the Texas lines. By participating in a rate from Dallas to Galveston via Fort Worth, for example, the Texas & Pacific obviously does not change the existing situation nor secure any control over the rate from Dallas to Galveston, which continues to be set by the direct line. On the other hand, the Texas & Pacific participates under virtual compulsion in rates from local points on its line to Galveston. It can not, however, reduce such rates

without the concurrence of the Texas carriers, and therefore its participation is in no sense effective. Hence by participating in rates to the Texas ports from either competitive or local points on its line, the Texas & Pacific does not change the situation which would exist if it did not participate at all. If it is subjected to a section-3 order it has no real alternative or choice as to the manner of complying therewith. The only real method open is that which would exist if it did not participate at all, *viz.*: an increase in the rates to New Orleans.[1] From the logical standpoint, therefore, whether the New Orleans carriers do not participate in the rates at all or participate in the ineffectual manner they do is immaterial, and if in the former case they could not, as is conceded, be chargeable under section 3, it must follow that they can not properly be so charged in the latter event. Appellees have failed wholly to meet this proposition.

These appellants reiterate that they are under legal compulsion to establish through routes to the Texas ports, section 1(4), and are under potential legal compulsion, section 15(3), and under present practical compulsion to continue joint rates. Imposing on them liability under section 3 therefore ignores the practical aspects and at

1 In the brief for the government it is pointed out (page 105) that "Acting alone, they [the New Orleans carriers] could remove the discrimination by raising their rates to New Orleans." But this would be true if they did not participate in rates to the Texas ports at all, yet the government does not contend that under such circumstances they could be subjected to a section-3 order. This is an important point which none of the appellees has met.

the same time declares illegal an act virtually necessitated by the statute itself. There comes to mind the observation of the Court in *Penn. Rfg. Co.* v. *W. N. Y. & P. R. R. Co.*, 208 U. S. 208, 221-22, that "There are other reasons * * * why the Lehigh Valley should not be held for discrimination * * *. That company was but a connecting carrier and took the cars as they were delivered to it by the initial carrier * * *. *It was the duty of the connecting carrier to do so* and it was not rendered liable for any allegedly wrongful act of the initial carrier because of the adoption of a joint through rate * * * which was in itself reasonable" (emphasis supplied).

It is of sufficient importance to repeat, that the practical difficulties of enforcing the law which appellees conjure up should the principle here contended for be adopted, are little more than self-induced fantasies and contribute nothing toward the decision of the case. There is nothing in the record nor in the Commission's decision to indicate that the overthrow of the *Ashland Fire Brick* doctrine was based on any such practical consideration. It merely concluded from its own construction (or misconstruction) of certain decisions of this Court that its conception of its powers had theretofore been too narrow. As a matter of fact, history demonstrates that the very doctrine applied by the Commission against these appellants (rater than the one for which they contend) is impracticable. It results in the practical difficulty

and the logical impasse which the Commission encountered in *Paper & Paper Articles between Western Trunk Line Points*, I. & S. Docket No. 3724 (unreported; Aug. 12, 1932). There the Commission obviously, plainly, refused to carry to its logical conclusion the doctrine applied in the instant case. Concerning that decision appellees say merely that "in that case also there is lacking the necessary participation in the preferential and prejudicial rates." This, however, implies, a *degree* of participation, whereas the principle announced by the Commission herein expressly excludes any question of *degree*, and imposes liability under section 3 if there is participation *at all*. The doctrine of the *Ashland case* recognized (and properly) differences in treatment based on degrees of participation; but that principle was expressly overturned herein by the Commission. Therefore, when the Commission, faced with the practical dificulty or impossibility of applying the principle which it has espoused, renounces that principle and reverts to the doctrine of determining liability under section 3 according to the *degree* of participation, it executes a wholly illogical *volte face*. Under the doctrine applied against these appellants there can be no question of degree.

In short, the practical and logical difficulties in the situation attend, not the doctrine contended for by these appellants, but the contrary principle sought to be applied against them by the Commission.

IV. The Commission May Not Under the Guise of Correcting Discrimination Prevent Competitive Departures from a Mileage Basis in the Establishment of Rates.

The fourth proposition in appellees' brief does not meet the situation. Whether there may be a discrimination even though the assertedly prejudicial and the assertedly preferential rates are the same in cents per 100 pounds, is here beside the point. Appellees do not meet the proposition that the Commission may not prevent a departure from mileage bases in the establishment of rates under the stress of competition. We have already seen (Brief on Reargument for these appellants, pp. 15 to 18, inclusive) that from the very first it was the intention of Congress not to impose a mileage basis of rates on the railroads. That question was specifically considered at the time of the passage of the original act. When the act was amended in 1906 the same question arose and elicited the same reaction. In the House, Mr. Russell, a member of that chamber's committee, stated that the new bill gave the Commission power to fix maximum rates, and in answer to the question "and leave the railroad company to charge any lower rate?" replied "They can charge any lower rate they see fit" (Cong. Rec., Vol. 40, Part 2, Page 1981). Mr. Stevens, likewise a member of the House Committee, declared "The Commission would have no authority to reduce a rate that

is already just, reasonable and fairly remunerative of itself, even if it did constitute a part of a relation of rates which bore hardly on some community" (*idem*. Part 3, Page 2084); and warned that "those who believe there should be a control of differentials, who desire * * * a distance tariff will be disappointed. There is nothing in this bill as to those particulars to change existing law or existing conditions" (*idem.*).

In the Senate the following succinct and significant colloquy occurred:

> "Mr. Lodge. Why, Mr. President, if rates were fixed upon a mileage basis every manufacturing industry in New England would go out of business. It would turn it all into a desert. * * *
>
> "Mr. Nelson. Is there any proposition in this bill to make a distance or mileage rate?
>
> "Mr. Lodge. No, Mr. President, none absolutely requiring a distance rate.
>
> "Mr. Nelson. Then what is the use of discussing it?"

This case is concerned with the administration of statute law. With the wisdom or unwisdom of the economic policy embodies in that law we have no concern. Rightly or wrongly, that law contemplates free competition; and, as a part thereof, that carriers should be permitted to disregard mileage in the making of rates when compe-

tition necessitates. It follows inescapably that in condemning a disregard of distance to the extent of establishing a parity of rates, the Commission overstepped the intention of Congress and exceeded its authority. To say that the Commission did not compel adherence to a mileage basis is sophistry. The differentials prescribed by the Commission were designed, and effectively so, to divert traffic to the Texas lines and the Texas ports; and the alleged concession to these appellants is wholly illusory.[1]

1 An interesting situation exists in this connection. The Shipping Act of 1916 (39 Stat. 734, U. S. Code, Title 46) was modeled upon the Interstate Commerce Act and presumably was intended to operate similarly with respect to water carriers as the latter operates with respect to railroads. It includes a section (Section 16 of the original act, Section 815 of the Code) containing a paragraph substantially the same as section 3(1) of the Interstate Commerce Act, and another (Section 17 of the original act, Section 816 of the Code) prohibiting unjust discrimination between ports. In 1925 certain south Atlantic ports complained to the Shipping Board that it was unjustly discriminatory under the act to maintain their rates to and from foreign ports differentially higher than those between such foreign ports and north Atlantic harbors. About the same time the Norfolk Port Commission assailed as unjustly discriminatory the practice of maintaining on other commodities equal rates from all Atlantic and gulf ports to foreign ports. The Shipping Board thereupon consolidated the complaints and instituted its Port Differential Investigation. As a result it found that it was not unjustly discriminatory either to equalize or to fail to equalize. The result is that the law permits equalization of all gulf ports on commerce to and from foreign ports in disregard of distance, and such equalization is, with unimportant exceptions, in effect today. Thus we have the incongruous condition of one administrative body of the government permitting equalization by carriers under its jurisdiction in disregard of distance, and another operating under a similar law, condemning an equalization. In the proceeding before the Shipping Board the Texas ports intervened and contended that the water carriers should be compelled to grant parities on all commerce. The report of the Shipping Board appears at pages 1298-1316 of the printed record.

V. Notwithstanding the Commission's Purported Consideration of the Competitive Nature of the Traffic Involved, It Gave no Real Consideration thereto and therein Erred.

In the brief for the carrier appellees an effort is made to reduce the contention of appellants to the proposition that the Commission has no jurisdiction over the traffic involved because it is foreign and coastwise in nature. This of course is not their position. Correctly stated, the contention of these appellants is this: the traffic involved in the case is subject to carrier competition which necessitates the maintenance of rates to and from New Orleans substantially the same as those to and from the Texas ports if appellants are to share in the movement of the traffic; therefore, it is not within the power of the Commission to condemn that parity under section 3(1). More succinctly stated, the proposition is that the Commission fatally erred in failing to give consideration to the competition which these appellants encounter.

The competitive situation is sufficiently important to restate. Notwithstanding that the water distances from New Orleans to representative foreign ports are generally less than those from Galveston thereto, the rates to and from the gulf ports are, with immaterial exceptions, the same. This parity is, as heretofore pointed out, maintained with legal sanction. Because of that, these appellants must maintain inland rates to and from New Or-

leans substantially the same as those to and from the Texas ports, for otherwise the aggregate rail and water charges via New Orleans are raised above those via the Texas ports and the New Orleans carriers are deprived of the traffic.

It is idle to contend that the Commission gave genuine consideration to this competitive condition. The express finding of the Commission was to the contrary: "We find that the present parity of rates * * * results in substantially greater service for the same rates to the Louisiana ports than to the Texas ports from and to interior points from which the short-line distance to New Orleans exceeds that to Galveston by approximately 25 per cent; * * * *and that the competition relied upon by defendants herein is no justification for the resulting prejudice from and to the interior points referred to*" (R. 3415; emphasis supplied).

That the Commission limited its finding to points from which the distance to New Orleans exceeds that to Galveston by more than approximately 25 per cent is beside the question. This was not done because of any difference in competitive conditions, but because, as the quoted excerpt shows, the Commission did not find that as to the excluded area the parity resulted in "substantially greater" service for the same charge—in other words, it did not find as to this area that there was discrimination. Therefore it did not, as to this traffic, even come

to the question of whether competition justified the practice of equalization.

The contention that the Commission gave consideration to the competitive situation by prescribing "nominal" differentials borders on the frivolous. It is true that the differentials are not great in cents per 100 pounds; but by reason of the parity of water rates between the contending ports, any differentials whatever in the rail rates, generally speaking, suffice to divert the traffic. This was the very purpose of the differentials prescribed by the Commission, and their measure was determined with that end in view. That they would have that effect was well known. Indeed, the Commission in its 1927 report observed:

> "The testimony leaves little doubt that the differentials prescribed in the original report, or even smaller differentials on most of the commodities, would in time divert to the Texas ports a substantial portion of most of the commodities having origin or destination in the affected territory that are now moving through New Orleans" (R. 3388).

The contention of appellees is thus clearly negatived by express findings of the Commission itself. The Commission made a "finding" that the competition relied upon by these appellants did not justify the supposed discrimination. It prescribed differentials which would

admittedly and avowedly divert traffic. To contend, then, that it did give consideration to competition is the merest sophistry, *and can only be taken as an admission that it should have.*

VI. Appellees Have Not Justified the Orders in Controversy as an Exercise of the Power to Remove Transportation Discrimination, and the Orders are Not Susceptible of such Justification.

(a) Both the government and the carrier appellees contend that the assailed orders are solely an exercise of the power to regulate rates and remove transportation discrimination, and that they do not amount to an attempted regulation of industrial or economic conditions. It is exceedingly significant, however, that in neither of the briefs is there any explanation of how the exemption of certain traffic, such as petroleum and its products, can be justified from a transportation standpoint.

In the brief for the carrier appellees it is stated (page 31) that the exclusion of petroleum merely indicates "that the Commission considered separately all of the commodities involved and found as to petroleum that the policy of equalization did not result in injury to the Texas ports." These appellants have heretofore pointed out, however (Brief on Reargument, page 48), that this finding is patently merely another way of stating the opinion that the Texas ports are getting a "fair share"

of this traffic, and that it could confer no benefit on them by the regulation of the rates thereon. The Commission had specifically found (128 I. C. C. 366) that the establishment of differentials in favor of Galveston would be even more certain to divert practically all the tonnage from New Orleans in the case of petroleum than in the case of the general run of traffic. The "injury" is therefore clearly present as much in the case of petroleum as in the case of the other commodities involved. This being true, and since neither the Commission in its report nor the appellees in their briefs point to any distinction from a transportation standpoint between petroleum and the other commodities, the conclusion inescapably follows that the considerations which impelled the exemption of petroleum must have been economic or commercial. The clue thus discerned as to the motives which actuated the Commission is abundantly, even conclusively, corroborated by the other grounds upon which the Commission exempted petroleum. All of them relate to commercial or economic considerations; and one of the foremost was that diversion of additional tonnage to the Texas ports would not, because of the peculiar nature of that traffic, build up the ports.

Nowhere in the briefs of the carrier appellees or the government is there any effort to explain the exemption of blackstrap molasses. *Blackstrap Molasses from Louisiana Points*, 171 I. C. C. 343; *Blackstrap Molasses from*

Louisiana Ports, 171 I. C. C. 571. Nor is there any explanation in the Commission's reports of its action in exempting from the orders grain and grain products from points in southern Kansas north of the line of the Chicago, Rock Island and Pacific (R. 3415). Obviously, however, there is no distinction in the transportation or competitive conditions between the portions of Kansas north of that line and the portions south thereof, and we are driven to the conclusion that in exempting this traffic the Commission was again actuated by some commercial or economic consideration not revealed in its report.

The parties to this litigation are at one in insisting that discrimination must be judged by the transportation standard. But unless the appellees can show that the prescription of differentials on certain commodities and the failure to prescribe them on others is justifiable under that standard, they are refuted by their own argument. And this showing they can not make.

(b) In the brief for the carrier appellees it is asserted that the orders in controversy are valid because the Commission found a transportation discrimination which it sought to remove; and that this being true the Commission has not unlawfully *interfered* with the discretion of carrier appellants nor deprived them of their property contrary to the due process clause. In this connection it is stated that the desire of a carrier to

favor points upon its own line of railroad can not excuse the maintenance of rates which result in preference or prejudice.

That this is a correct statement of the law seems to be no longer an open question. It is not, however, applicable to the case presented. The discrimination with which the carrier appellants are sought to be charged does not arise from any desire to favor points on their lines, but from the necessity of meeting competition *with other carriers*. Whether New Orleans is favored is of no interest to these appellants, and the benefit to it is purely incidental.

This fact suggests the primary, although not the only, distinction between the case at bar and *Virginia Ry.* v. *United States*, 272 U. S. 658, cited by appellees. In that case no element of carrier competition was shown. The trackage agreement by which the mines found to be preferred were granted an outlet to the west, was established not because of carrier competition but as part of an effort to keep up the appellant's eastbound traffic. Likewise the Virginian sought to deny the complaining mines an outlet to the west not because of a carrier competition, but solely because if it confined their outlet to its line it secured a longer haul and greater revenue.

The case is therefore readily distinguishable from that at bar. It may be that the mere desire to develop traf-

fic on a line does not justify a discrimination which is otherwise unlawful. But if the asserted discrimination is compelled by carrier competition it is not otherwise unlawful and therefore a different case is presented. The former situation flows from the desire of a carrier to increase its traffic by aiding points on its line in commercial competition; the latter arises from compulsions of carrier competition. It can no longer be doubted that the latter compulsions justify asserted discriminations under section 3 of the act, as well as under sections 2 and 4.

Conclusion

These appellants again submit that the question involved in this case is not new, and that the controlling principles are old and well settled. Twice has Congress considered the matter of port relationships, and on each occasion expressly withheld the power to disrupt them. Whether that power should be granted is beside the point; it has not been, and by no amount of "construction" can the Commission lay hold of it.

But even had the power been granted this would not be a case for its exercise. Section 3(1) is one part of a regulatory scheme competitive in principle and application. When these appellants seek to compete they exercise a right expressly reserved to them. When the Com-

mission imposed on them an artificial mileage basis it overrode the avowed intent of Congress. These propositions appellees do not and can not successfully dispute.

The orders assailed should be set aside in accordance with the prayer of the petitions.

Respectfully submitted,

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October 6, 1932.

APPENDIX

NOTES ON LEGISLATIVE HISTORY OF HEPBURN ACT

CONGRESSIONAL RECORD, VOLUME 40

(In quotations below the emphasis is in all cases supplied)

IN THE HOUSE

Part 2, page 1777:

Mr. Adamson, a member of the House Committee, was speaking on the bill and was interrupted by Mr. Boutell.

"Mr. Boutell. I have read recently in several of the leading southern papers very earnest editorials, written prior to the introduction of this bill * * * expressing, what seemed to them, well-grounded fears that this Commission in fixing rates, for example from the Mississippi Valley and the west to tidewater, would inevitably discriminate against the southern Gulf ports and in favor of the Atlantic ports.

"Now, if those fears are well-founded, certainly they are worthy of most serious and earnest consideration; and if it would be in the line of the gentleman's argument, I should like to have him refer to that matter as to whether those fears were well-grounded; * * *.

* * * * *

"Mr. Adamson. I have no doubt in the world that the press as well as a great many of the people at New Orleans, Savannah, Mobile, Brunswick, Galveston, Charleston, and ports on the south Atlantic seaboard and the Gulf do in good faith cherish very grave doubts and fears as to the dangers that they may suffer at the hands of the Commission * * *.

"* * * before our committee, in its hearings last year, there was some testimony going to show that it was desirable that power should be given the Commission to raise the rates from the Northwest to the southeastern ports, and it was specifically said that the routes running from the Northwest directly to the eastern seaports could not compete with them * * *. But, if, as was intimated by two or three witnesses up there, the purpose was to force the raising of the rates which were satisfactory and profitable to the carriers, because God and Nature had made the conditions favorable for a longer and a cheaper haul, of course we would never consent to it.

"In the debate on this floor during the last Congress I rose in my place and referred to it, while the gentleman from Michigan [Mr. Townsend] occupied the floor, and he assured me that in this enlightened day and generation there could be no fears of such an outrage being perpetrated on our commerce."

Part 2, page 1788:

Mr. Richardson of Alabama, a Committee member, was speaking on the bill:

"Now I come, Mr. Chairman, to another question to which I shall briefly refer, and that is the relation of rates and differential rates. * * * What are differential rates? It is not an unjust or unreasonable or excessive rate, but it is the difference between the rates given to two competing localities on traffic for which they are competing. It does not concern the public. It is competition between two towns; that is what it is. And if the Commission has the power to regulate differentials then would follow the authority to control relative rates in general between competitive localities. It is best to pause there, it seems to me.

* * * * *

"All I have said and what I believe is that when you give power to the Commission to regulate the relation of rates, brought about by competition between two towns and having no connection with any complaint that the rate so charged by the carrier in either of the competing towns or localities is too high, then, in my opinion, you would authorize the Commission to prescribe rates without any regard to natural conditions and advantages possessed by one locality over another.

"Mr. Murdock. I would like to ask the gentleman from Alabama if it will not also relate to competition between sections?

"Mr. Richardson of Alabama. Of course.

"Mr. Murdock. That is exactly in the condition which gives to 1,500 commodities east of the Missouri River in the United States a 'blanket postage-stamp rate' from any portion of the United States to the Pacific coast; and no point west of the Missouri River enjoys the same privilege in shipments to the Pacific coast. Will the bill reach that sort of discrimination?

"Mr. Richardson of Alabama. No sir, except through the power that is given the Commission to fix the rate when an unreasonable rate has been charged. * * * I think that the whole spirit, conception, and policy of the Act of Commerce was not along that line whatsoever * * *. I understand that in the relation of rates when you give the Commission power to fix the relation of or adjust the differential rates you give a power to the Commission to fix a certain rate, not because it is unjust or because it is an extreme rate, but because the Commission ought to recognize that all localities are of like conditions. Why, take, for instance, the hauling of corn from Iowa down to New Orleans, La., and taking the same quantity of corn and hauling it from Iowa to New York—to one of the Atlantic ports.

"Do you say that the Commission ought to be given power to come in and disregard the physical fact that, figuratively speaking, you could roll a barrel of flour down from Iowa to New Orleans * * *? Do you think the Commission ought to have power to come in there and ignore this natural condition that God Almighty has created? Now, do you think that? [Applause]

"Mr. Smith of Kentucky. I do not think they ought to have any power to ignore this natural obstruction that may be in the way, but I do believe that the Commission ought to have power to determine upon some kind of just relation between rates from a point in Iowa to New Orleans as well as a rate from a point in Iowa to New York.

"Mr. Richardson of Alabama. *Then that gives the Commission power to interfere with competition, which is hostile to the very doctrine we are contending for.*"

Part 3, page 2084:

Mr. Stevens of Minnesota, a member of the House Committe on Interstate and Foreign Commerce, speaking on the Hepburn Bill:

"Differentials."

"The gentleman from Maine was greatly exercised about this bill controlling the most important question of

'preferentials' as he termed them. If I thought it did give that power I would be just as much exercised as he is. My people are just as much interested that there should not be any undue control of differential rates as the gentleman from Maine, because if any particular body should have such authority we should always be in danger of distance tariffs and unwise action compelled by political exigencies. This would either exclude our products from our best markets or greatly reduce the value of our products and our property. But it is just as clear to us and to the whole committee that there is no such power in this bill* * *."

Part 3, page 2085:

"The Commission would have no authority to reduce a rate that is already just, reasonable, and fairly remunerative of itself, even if it did not constitute a part of a relation of rates which bore hardly on some community."

On the same page Mr. Stevens was interrupted by Mr. Olmstead,, who complained about the carriage of foreign products to tidewater from more distant points on rates about the same as those from less distant ones:

"Mr. Olmsted. Does the gentleman think it fair that foreign products in my district should be charged for at the rate of ten times as much per ton mile upon the trans-

portation of wheat and flour as from his district in Minnesota to the same point?

"Mr. Stevens of Minnesota. Now it must be conceded, Mr. Chairman, that there always is an element of unfairness in such a situation. His rate may be reasonable and fair and just. If so, he can not complain. The relation of rates may injure him. That is one of the things that he and everybody else will have to stand in this country. Somebody is going to be injured by any kind of legislation we pass. If we granted to the gentleman the benefit he desires, we might injure others, and we think we would—ten times as much. What we are trying to do is to injure just as little and benefit just as much as we can, and that is why we reduce the power of the Commission to the smallest scope, which shall be fairly effective, as we do by the provisions of this bill.

"Mr. Olmsted. But in this bill, * * * you take away from the Commission the power to decide what would be fair and what would be unfair in such a case as I have mentioned.

"Mr. Stevens of Minn. But we do not take anything away from them. If there is an unfair discrimination under the provisions of the present law existing, you have the same remedy, if this should become a law, as you did before, and no more and no less.

"Mr. Olmsted. We do not have any more. That is what I am getting at. Ought we not to have more?

"Mr. Stevens of Minn. No, you ought not, under the present circumstances, because that would bring the evils so eloquently shown by the gentleman from Maine [Mr. Littlefield] and your colleague [Mr. Sibley] which we realize and desire to avoid * * *. This bill can not correct all the evils and does not pretend to. We only say we are endeavoring to correct some of them."

Part 3, page 2086:

Mr. Stevens:

"*Those who believe that there should be a control of differentials, who desire* a vital long-and-short-haul provision and *a distance tariff will be disappointed. There is nothing in this bill as to those particulars to change existing law or existing conditions.*"

Part 3, page 2247:

Mr. Stevens:

"* * * We do not authorize the Commission of its own sweet will to change this article or that, to readjust the classifications, or readjust the freight rates in this arbitrary or initiatory manner. We confine the action of the Commission to the case which is presented and prevent them from arbitrarily injuring any particular lo-

cality. *We do not give them the power to say which port shall be built up,* which city shall be preferred; we leave open the competitive forces of the railroads. The old bills which we had sought to stifle competition; *we leave competition in force. The railroads running south, west of the Mississippi, and the railroads running east, north of the Ohio, will have to fight out the question as to which road shall carry the grain for export abroad.*"

* * * * *

"If a Commission shall be created which will listen to the conflicting interests of different localities and which shall endeavor to conserve the natural advantages of one community over another, which shall endeavor to fasten upon our country zones of influence and zones of trade, which shall endeavor to interfere with or restrain the active, persistent and constant competitive forces of commodities and localities, as well as shippers and railroads, we will have entered upon a dangerous, if not a paralyzing, course" * * * *

Part 3, pages 2247-48:

"It is proposed to give to the Interstate Commerce Commission, to a limited degree, the rate-making power. The Commission may * * * decide what shall be the highest rates to be thereafter charged by the carrier. *This will not prevent the carrier, in the face of competition, from lowering its rates, in order to save its share*

*of the business * * * It* [the Hepburn Bill] *will not give the Commission the power to determine differentials, the power to say whether grain from the Northwest shall be shipped for export by way of the gulf ports or the north Atlantic ports, the power to destroy the law of competition * * * *. The former bills were intended to destroy railroad competition. The pending bill invites competition* and it preserves all the competitive forces which tend to increase economy of transportation and reduce the cost thereof."

IN THE SENATE

Part 4, page 3792:

Mr. Rayner: "I know that it is contended that this bill confers the right upon the Commission to adjust differentials. I say that it gives the Commission no such power. *Every member of the committee in the House of Representatives has emphatically denied that there was any intention to incorporate any such grant in the bill, and there is nothing whatever in the bill that admits of such construction.*"

Part 5, page 4111:

"Mr. Lodge. Now Mr. President, Mr. Prouty also took up the question of port differentials. The Senator from Ohio in that very great argument which he made the

other day, in discussing the question of port differentials, pointed out that by their action on port differentials the Commission had the power to close the port of Boston tomorrow if they so pleased. They could indeed close every port in Northeast, and our seaboard is the one great natural gift we have. * * *

"Mr. Prouty's reference to port differentials raises the question of what might be expected if the Commission should undertake to fix export rates to the several ports under the Hepburn bill. Their action in making the recent arbitral award was entirely extra-official, and their award has no more force than that given it by the agreement of the commercial bodies to submit the controversy to arbitration and abide by the decision. If, however, they should undertake to fix port rates under the Hepburn bill, their action would be official, and the question would be brought up whether they would not be governed by the clause of the Court prohibiting the giving of any preference to the ports of one State over those of another by any regulation of commerce or revenue. If the courts should hold that the power to fix port rates was subject to this limitation, it is difficult to see how export rates to the ports could be made on any but a mileage basis. * * *

"Mr. Lodge. Mr. President, to show how much this law involves and why it means so much to our people, I wish to introduce a few statistics in regard to the Port

of Boston, which is to be put absolutely at the mercy of this Interstate Commerce Commission, and then ask if it is unreasonable that we should desire provisions which would protect us, in common with the rest of this country, so far as possible against injudicious or hasty action, and let it be remembered that what we ask for ourselves is just as important to every other carier in the country and every other state, great or small. * * *

* * * * *

"Mr. Lodge: Why, Mr. President, if rates were fixed upon a mileage basis, every manufacturing industry in New England would go out of existence; it would turn it all into a desert. * * *

"Mr. Nelson: Is there any proposition in this bill to make a distance or mileage rate?

"Mr. Lodge: No, Mr. President, none absolutely requiring a distance rate.

"Mr. Nelson: Then what is the use of discussing it?"

Part 7, page 6683:

The following amendment was proposed by Senator Gallinger of New Hampshire: "The Commission in prescribing any maximum rate or charge, as herein provided, shall not be authorized to receive complaints or determine differentials or preference of one locality over another."

Senator Rayner of Maryland speaking upon the proposed amendment stated:

Mr. Rayner: "According to the amendment they could not entertain any complaint by localities on the same lein.

Mr. Nelson: "I do not want to interrupt the Senator—

Mr. Rayner: "I will submit to an interruption in a minute. I did not know that an amendment of this sort would come up, but having been informed by the Senator from New Hampshire, and having observed the amendment which he introduced at an earlier stage of the session, I want to say a few words upon the subject because I think it is one of the most important subjects before us, and I think the amendment is fatal to the bill.

"I desire to emphasize what I have heretofore said at the opening of this debate upon the subject of differentials. This is a most important inquiry, and if the bill gave the right to the Commission to adjust differentials between competitive localities I doubt very much whether the bill would pass. *This power would be so unlimited that I am not certain we would be willing to confer it upon the Commission. It would virtually take the ports of entry of this country out of the hands of the railroads who are building them up, and place them in the hands of the Commission to destroy their business and throttle their trade and enterprise if they desired to do so,* and

even if the Commission were entirely impartial, as I believe it is and will be, it would nevertheless devolve upon it a duty of such a delicate nature and of such tremendous responsibility that I do not think that any tribunal would be equal to its accomplishment.

"Let us not fall into error upon this point. If the bill confers any such authority I want to know it, and if by the remotest implication it could be construed as granting it, the people who are interested are entitled to understand it. The Committee of the House came to the conclusion that it did not embrace differentials. The House passed it. Relying upon that assumption, the majority of us have, I believe, entertained the same idea. The I. C. C. does not believe that it could exercise such a jurisdiction. Every board of trade and Chamber of Commerce and business organization that I have heard from are all of this opinion, that the measure does not confer such power; but there are several Senators upon the floor who entertain a different idea, and who have claimed that the right exists under the phraseology of this bill."

* * * * *

"There is no question connected with this controversy of the practical importance that this is. Let me say that I do not find anything in this bill whatever that gives the Commission any right to adjust differentials."

* * * * *

Part 7, page 6684:

"Mr. Gallinger. I simply wanted to suggest to the Senator that among other Senators I consulted on this question was the Senator from Maryland and he promised me to give me the benefit of his learning and experience on this matter. Not hearing from the Senator, I have submitted the amendment, which is not entirely mine; other persons were consulted about it. I believe it is a good amendment, and that if put in the bill it will save a great deal of harm that may come from the bill without it. But under the circumstances, Mr. President, I will ask unanimous consent to withdraw the amendment that I may confer with Senators further, and it is possible we may agree upon some amendment that can be put in the bill. * * *"

* * * * *

"Mr. Elkins. Mr. President, what is the pending question?

"The Vice President. The question is on the amendment of the Senator from New Hampshire [Mr. Gallinger].

Mr. Gallinger. I withdraw it temporarily.

"The Vice President. The Senator from New Hampshirt withdraws his amendment temporarily. Are there further amendments to section 4?"[1]

1 The amendment was not reintroduced.